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Supreme Court of the United States

OCTOBER TERM, 1955

No. 404

OFFUTT HOUSING COMPANY, A CORPORATION, PETITIONER,

vs.

COUNTY OF SARPY AND ROBERT M. EBY, TREASURER OF COUNTY OF SARPY, NEBRASKA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

PETITION FOR CERTIORARI FILED SEPTEMBER 17, 1955

CERTIORARI GRANTED NOVEMBER 14, 1955

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

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[fols. 1-3] **IN THE DISTRICT COURT OF SARPY COUNTY, NEBRASKA**

Doc. U Case No. 6685 No. 350

OFFUTT HOUSING COMPANY, Plaintiff,

vs.

COUNTY OF SARPY and ROBERT M. EBY, Treasurer of County of Sarpy, Nebraska, Defendants

AMENDED AND SUPPLEMENTAL PETITION FOR DECLARATORY JUDGMENT—Filed June 17, 1953

Comes now the plaintiff and for cause of action alleges that:

I

Plaintiff is a Nebraska corporation, with its principal place of business in Omaha, Douglas County, Nebraska.

II

Defendant, the County of Sarpy, hereinafter referred to as "Sarpy County," is a body politic and corporate and is one of the counties established in the State of Nebraska, and that the defendant, Robert M. Eby, is the duly elected, qualified and acting county treasurer of the County of Sarpy.

III

This action is brought under the provisions of the Declaratory Judgments Act, as provided for in Sections 25-21,149 to 25-21,164, inclusive, 1943 Revised Statutes of Nebraska.

IV

Offutt Air Force Base is a permanent military base of the United States and is located entirely in Sarpy County, Nebraska. The United States owns all of the land on which Offutt Air Force Base is located and, prior to January 1, 1952, the State of Nebraska and all of the political subdivisions thereof, in accordance with Sections 72-601 to 72-605, inclusive, of the 1943 Revised Statutes of

Nebraska, ceded taxing jurisdiction of all property located at Offutt Air Force Base, as is shown by Exhibit "A" and "A-1" attached hereto and made a part of this petition, and that at all times during the year 1952 and thereafter, [fol. 4] the State of Nebraska and all political subdivisions thereof have been without power or authority to tax property on or within such federal reserve.

V.

Section 8 of Article I of the Constitution of the United States grants to the United States exclusive taxing jurisdiction over all property located at or upon Offutt Air Force Base.

VI

No part of Offutt Air Force Base is within any municipality or school district and no city or school district taxes are involved in this action.

VII

On the 15th day of January, 1951, the United States, by the Department of the Air Force, in accordance with the provisions of Section 1748b-(b-2) 1952 Cumulative Supplement to 12 U.S.C.A., certified Offutt Air Force Base as a permanent United States military establishment, as is shown by Exhibit "B" attached hereto and made a part of this petition.

VIII

At all times since before January 18, 1951, Offutt Air Force Base has been the property of the United States used for military purposes.

IX

In accordance with United States Public Law 211–81st Congress (Sections 1748 to 1748-i, 1952 Cumulative Supplement to 12 U.S.C.A.), commonly known as the "Wherry Act," the United States, by the Department of the Air Force, on January 18, 1951, leased to the plaintiff for a period of seventy-five (75) years, part of the land on which Offutt Air Force Base is located, as a site for rental housing for Offutt Air Force Base personnel, all as shown

by Exhibit "C" attached hereto and made a part of this petition. Such lease was, on January 31, 1951, recorded in the office of the Register of Deeds of Sarpy County, [fol. 5] Nebraska, in Book 14 of the Miscellaneous Records at page 567, and such lease is still in full force and effect.

X

Between the dates of January 1, 1951 and June 23, 1952, plaintiff, in accordance with the "Wherry Act," financed, erected and completed six hundred and eleven (611) rental housing units on the leased premises for the benefit of personnel assigned to duty at Offutt Air Force Base, as a part of the Strategic Air Command, of the Department of the Air Force, whose headquarters is at Offutt Air Force Base, and that in accordance with Section 11 of the hereinbefore referred to lease (Exhibit C), the buildings and improvements, upon completion of the plaintiff, became a part of land owned by the United States, and became property of the United States, used exclusively for national military purposes.

XI

During the time that the land on which Offutt Air Force Base is located was owned by the United States and used exclusively for military purposes, and after the hereinbefore referred to rental housing improvements were completed thereon, and during the time when such rental housing units and such buildings and improvements were real property of the United States and not subject to taxation by the State of Nebraska or any of its political subdivisions, the county assessor of defendant county, in the erroneous belief that property located on Offutt Air Force Base was subject to taxation in Sarpy County under the laws of the State of Nebraska and that such buildings and improvements on Offutt Air Force Base were taxable property of the plaintiff located in Sarpy County, Nebraska, did, on June 23, 1952, without the consent or authority of the plaintiff or the United States, execute and return a purported 1952 personal property schedule of plaintiff's property taxable in Sarpy County, a copy of such purported schedule being attached hereto, marked Exhibit "D" and

made a part hereof. That under Schedule F of such pur-
[fol. 6] ported personal property schedule (Exhibit D), the County Assessor listed as personal property of the plaintiff taxable in Sarpy County, Nebraska, property in the total valuation of $69,900.00 and that under Schedule I of such purported personal property schedule (Exhibit D) said county assessor listed as personal property of the plaintiff taxable in Sarpy County, Nebraska, "Improvements on Leased Land. . . $735,785.00."

XII

The attempted assessing or listing of all property described in the purported personal property tax schedule (Exhibit D) as personal property of the plaintiff subject to taxation in Sarpy County, Nebraska, and the levying of taxes thereon against the plaintiff was illegal, null and void and of no force and effect for the following reasons:

A. On March 10, 1952, June 23, 1952, and thereafter, the State of Nebraska and its political subdivisions were without authority to tax property located at or upon Offutt Air Force Base.

B. Plaintiff did not, either on March 10, 1952, on June 23, 1952, or thereafter, own any improvements on leased land in Sarpy County, Nebraska.

C. Section 77-1209, 1943 Revised Statutes of Nebraska, under which the defendants sought to assess the aforesaid improvements as the property of the plaintiff and to levy taxes thereon against the plaintiff, required any improvements taxable under such statute to be assessed to the owner of such improvements and that the owner of the improvements was, on June 23, 1952 and thereafter, the United States, whose property is not subject to taxation by the State of Nebraska or any of its political subdivisions.

D. The lands on which the improvements were located were not, during any part of 1952, "public lands" [fol. 7] within the purview of Section 77-1209, 1943 Revised Statutes of Nebraska.

E. The aforesaid improvements at Offutt Air Force Base were, at the time of the attempted assessment

thereof as personal property of the plaintiff and thereafter, real estate and a part of land owned by the United States and were not personal property.

F. Offutt Air Force Base and the improvements thereon constitute property of the United States, used exclusively for military purposes, and that under the laws of the State of Nebraska and its political subdivisions, neither the land on which Offutt Air Force is located nor any interest therein or any buildings or improvements thereon are subject to taxes levied by the State of Nebraska or Sarpy County.

XIII

On the basis of such purported but illegal listing as personal property of the plaintiff taxable in Sarpy County, Nebraska, the property described in the purported 1952 personal property tax schedule (Exhibit D) as of the total valuation of $825,685.00, the defendant, County of Sarpy, illegally assessed taxes thereon against the plaintiff in the amount of $10,783.45; that $9,870.55 of such purported tax was the amount levied and assessed upon the hereinbefore referred to improvements at Offutt Air Force Base based upon the erroneous assumption that such improvements at Offutt Air Force Base were personal property of the plaintiff located in Sarpy County, Nebraska and taxable to the plaintiff on the basis of the valuation of the same being $755,785.00 and that the balance of said tax, amounting to $912.90, was levied and assessed on the assumption that the balance of the property listed in such purported personal property tax schedule (Exhibit D) as the total valuation of $69,900.00 was taxable in Sarpy County under the [fol. 8] laws of the State of Nebraska. The items listed under Schedule F of such purported personal property tax schedule (Exhibit D) were, on March 10, 1952 and June 23, 1952, property of the plaintiff located at or upon Offutt Air Force Base, but, according to the decisions of the courts of the United States, this property located on Offutt Air Force Base is not subject to taxation by the State of Nebraska or any political subdivisions thereof but, however, if such property of the purported assessed valuation of $69,900.00 was, in 1952, property assessable and taxable

in Sarpy County, plaintiff offers to pay this tax thereon in the amount of $912.90 and legal interest.

XIV

Although the purported 1952 Sarpy County tax levy against the plaintiff was illegally levied against the plaintiff, and although the 1952 Sarpy County levy of personal property taxes against the plaintiff is invalid, illegal, null and void and of no effect, the defendant, the County of Sarpy, contends that all property described in the purported 1952 personal property tax schedule (Exhibit D) was personal property of the plaintiff which was legally assessed as personal property of the plaintiff located in Sarpy County and legally taxable therein and further contends that the entire tax levy of $10,783.45 is valid and threatens to collect the entire tax if the same is not paid. That the defendant, Robert M. Eby, as County Treasurer of the County of Sarpy, will attempt to enforce the collection of said tax if the same is not paid.

XV

Because of the facts herein alleged, an actual controversy exists between the parties to this action and that, under the provisions of Sections 25-21, 149 to 25-21, 164, 1943 Revised Statutes of Nebraska, and the decisions of the supreme court of Nebraska, this court has the power to enter a declaratory judgment to settle the controversy between the parties on the facts alleged herein. The controversy between between the parties has not been the subject to any [fol. 9] suit, decision or judgment heretofore. Plaintiff has no remedy at law and that a declaratory judgment herein will speedily and completely settle the controversy between the parties.

Wherefore, plaintiff prays that this court enter a declaratory judgment, declaring, determining and adjudging that:

A. Offutt Air Force Base is property reserved or acquired and used by the United States for military purposes.

B. The State of Nebraska and its political subdi-

visions were, in 1952, and thereafter, without power or authority to tax property located at or upon Offutt Air Force Base.

C. Offutt Air Force Base, the land on which it is located and rental housing improvements thereon were, on June 23, 1952 and at all times thereafter, property of the United States, not subject to taxation by the State of Nebraska or Sarpy County.

D. On June 23, 1952 and at all times thereafter, rental housing improvements on Offutt Air Force Base was real estate and not personal property and was a part of the land on which Offutt Air Force Base is located.

E. The land on which Offutt Air Force Base is located was not during any time during 1952 a part of public lands.

F. The purported 1952 assessment of "Improvements on Leased Lands . . . $755,785.00" as personal property of the plaintiff was illegal, null and void and of no effect.

G. The purported 1952 levy of taxes against the plaintiff by the defendant on improvements on leased land of the purported value of $755,785.00 was illegal, null and void and of no effect.

H. The purported 1952 assessment of property listed in Schedule F of the purported personal property tax schedule as property subject to taxation in Sarpy County under the laws of the State of Nebraska, was illegal, null and void and of no effect.

I. The property of the plaintiff located on Offutt Air [fol. 10] Force Base, to-wit: Furniture and fixtures—tools and equipment—household appliances, located on Offutt Air Force Base (as shown in Schedule F of Exhibit D) was not subject to taxation in Sarpy County, in 1952.

J. The purported 1952 levy of taxes against the plaintiff on the property listed in Schedule F of the purported personal property tax schedule was illegal, null and void and of no effect.

K. The purported personal property tax schedule made by the county assessor of Sarpy County showing personal property of the plaintiff subject to taxation in

Sarpy County under the laws of the State of Nebraska be corrected to eliminate therefrom improvements on leased land of the valuation of $755,785.00.

L. The purported personal property tax schedule made by the county assessor of Sarpy County showing personal property of the plaintiff subject to taxation in Sarpy County under the laws of the State of Nebraska be corrected to eliminate therefrom property listed in Schedule F thereof.

M. The defendant, Robert M. Eby, as Treasurer of Sarpy County, and the defendant, County of Sarpy, its officers and agents, be temporarily and permanently enjoined from including any rental housing improvements on Offutt Air Force Base as personal property of the plaintiff in Sarpy County and from levying any tax against the plaintiff covering such improvements on Offutt Air Force Base and from enforcing any tax against the plaintiff on improvements at Offutt Air Force Base.

N. The defendant, Robert M. Eby, as Treasurer of Sarpy County, and the defendant, County of Sarpy, its officers and agents, be temporarily and permanently enjoined from taxing furniture and fixtures—tools and equipment or household appliances located at or on [fols. 11-24] Offutt Air Force Base and from enforcing any tax thereon against the plaintiff.

O. Other and further relief as may be just and equitable.

Offutt Housing Company, a Corporation, By (S.) Charles S. Reed, Its Attorney.

Duly sworn to by Carl C. Wilson. Jurat omitted in printing.

Jules O. Hendricks, a resident of Sarpy County, Nebraska and the owner of property liable to execution therein, hereby enters his appearance as surety for cost in the above entitled action.

(S.) Jules O. Hendricks.

[File endorsement omitted.]

Exhibits A, A-1, B, C and D. attached to the complaint, having also been introduced in evidence at trial as Exhibits 2, 2-A, 3, 4 and 5, respectively, are, to the extent that they are pertinent, printed with the Trial exhibits and accordingly are not printed at this point.

[fol. 25] IN THE DISTRICT COURT OF SARPY COUNTY, NEBRASKA

[Title omitted]

ANSWER OF ROBERT M. EBY

Comes now the defendant, ROBERT M. EBY, Treasurer of the County of Sarpy, Nebraska, and for answer to the plaintiff's Amended and Supplemental Petition for Declaratory Judgment alleges:

I

The defendant admits Paragraph II of the plaintiff's Amended and Supplemental petition.

II

The defendant further denies each and every allegation contained in the plaintiff's Amended and Supplemental Petition not hereinbefore admitted.

Wherefore, the defendant prays that the plaintiff's petition may be dismissed at its costs.

Robert M. Eby, Treasurer of County of Sarpy, Nebraska, Defendant. By (S.) Orville Entenman, his Attorney.

Duly sworn to by Robert M. Eby. Jurat omited in printing.

[fol. 26] IN THE DISTRICT COURT OF SARPY COUNTY, NEBRASKA

[Title omitted]

AMENDED ANSWER OF COUNTY OF SARPY—Filed January 21, 1954

Comes now the defendant, County of Sarpy, and for answer to the plaintiff's petition filed herein states:

I

Defendant admits Paragraph II of the plaintiff's petition, that the defendant, County of Sarpy, is a body politic and corporate and that Robert M. Eby is the duly elected, qualified and acting County Treasurer of the County of Sarpy.

II

The defendant admits that Offutt Air Force Base is a permanent military base of the United States and is located entirely in Sarpy County, Nebraska.

III

The defendant alleges that on the 18th day of October, 1949 Charles S. James, single, by warranty deed reciting $1.00 and other valuable consideration, with $18.70 revenue stamps attached thereto, conveyed to the Omaha Chamber of Commerce 47.86 acres more or less as follows, to-wit:

Commencing at a point 6.75 chains east of the southwest corner of the SE¼ of said Section 35, thence north 1150 feet, thence east 2644.05 feet to a point 65 feet north to the northeast corner of Lot 6b, thence south 65 feet, thence west 290 feet along the north line of 6b; thence south 360 feet, thence west 885 feet, thence south 725 feet to the south line of Section 35, thence west 1469.05 feet to the place of beginning, all in Section 36, Township 14, Range 13 in the County of Sarpy, Nebraska,

[fol. 27] said deed filed October 20, 1949 in Deed Record Book No. 67 at Page 415 in the Register of Deed's office in the County of Sarpy, Nebraska.

IV

The defendant further alleges that on or about the 21st day of October, 1949 the Omaha Chamber of Commerce, a Corporation, by warranty deed reciting $1.00 and other valuable consideration, and no revenue stamps attached, conveyed to the United States of America said tract of land described in Paragaph III hereof, said deed being filed April 12, 1950 and recorded in Deed Record Book No. 67 at Page 537 in the Register of Deed's office in the County of Sarpy, Nebraska.

V

That on or about the 8th day of August, 1949 the 81st Congress of the United States enacted Public Law No. 211 amending the Act of August 5, 1947 (10 U. S. C. 1270) known as the "Wherry Housing Act." Section 805 of said law, as amended, provided and granted authority to the Secretary of the Air Force, when determined desirable to lease property of the United States of America upon such terms and conditions without regard to limitations imposed by said Act in respect to term or duration and further provided that the power vested in the Secretary of the Department to revoke any lease made pursuant thereto in the event of a national emergency shall not apply; and further provided that the Secretary of the Air Force is authorized to sell, transfer and convey, at fair value, as determined by him for use under this title, any right, title, or interest in any real property under his jurisdiction, notwithstanding any limitations or requirements of the law with respect to use or disposition of such property. Said Act further provided in Section 807 thereof that

[fol. 28] "Nothing in this title shall be construed to exempt any real property acquired or held by the Commissioner under this title from taxation by any State or political subdivision thereof, to the same extent according to its value as other real property is taxed."

VI

The defendant further alleges that on or about the 18th day of January, 1951 the Secretary of the Air Force and Offutt Housing Company, a Corporation organized and existing under the laws of the State of Nebraska, with its principal place of business at 918 City National Bank Building, Omaha, Nebraska, in accordance with Title VIII of said Act of Congress of August 8, 1949, entered into an agreement for the leasing of the above described property and other to the Offutt Housing Corporation, said instrument filed the 31st day of January, 1951 and recorded in Miscellaneous Record No. 14 at Page 567 in the Register of Deed's office in the County of Sarpy, State of Nebraska.

VII

The defendant further alleges that the above said alleged lease provided for the consideration of the sum of $100.00 per annum for a term of 75 years for the use of approximately 63.05 acres of unimproved real estate for the purpose of erecting, maintaining and operating a multiple family dwelling consisting of 611 units. That the above set out lease further provided that said lease would be subject to termination only in the event that said lessee failed to complete said improvements in whole or in part, or failed to apply for mortgage insurance to the Commissioner of the Federal Housing Administration or upon the refusal of issuance of said insurance, or in the event that the above rental consideration be not paid; that said lease further provided that upon the exercise of a right to terminate said lease in accordance with Condition 1 thereof, the government may at once re-enter the leased premises and repossess itself thereof and remove all per- [fol. 29] sons therefrom, or may resort to any summary action to recover the same and that notice of termination must be given to any lessee, Commissioner and the proposed mortgagee, if any, as set out in Paragraph 2, Conditions Nos. 2 and 17 of said lease.

VIII

Defendant further alleges that Conditions 7 and 8 of said lease provide that the lessee, Offutt Housing Com-

pany, agrees to comply with all laws, ordinances and regulations applicable to the leased area with regard to construction, sanitation, leases or permits to do business and other matters. That the defendant further agrees to pay all taxes and assessments that may be taxed, assessed or imposed upon the government or upon the lessee with respect to or upon the leased premises; that said lease further provides in Condition 8 thereof as follows, to-wit:

> "In the event any taxes, assessment or similar charges are imposed with the consent of Congress of the United States upon the property owned by the government and included in this lease (*as opposed to the leasehold interest of the lessee therein*) this lease shall be re-negotiated so as to accomplish an equitable reduction in the rental provided above * * *."

IX

The defendant further alleges that said lease provides in Condition 20 thereof that the lessee at its own cost and expense, insure against fire the buildings that may be erected hereinafter on said leased premises, payable to the *lessee* and security holder as their respective interests appear. Determination by either party not to re-build in case of complete destruction of any one or more of the buildings shall be binding on both parties of this lease and said lease be re-negotiated in accordance therewith.

X

That on or about the 6th day of February, 1951 there was filed in Book 1 of Plats at page 96 in the Register [fol. 30] of Deed's office of the County of Sarpy, Nebraska, a purported plan designated "Rental Housing Project Offutt Air Force Base" showing streets, avenues, alleys and location of proposed rental units all as shown by Exhibit "A" attached hereto and made a part hereof and attached to this answer.

XI

The defendant further alleges that on or about the 1st day of February, 1951 plaintiff, Offutt Housing Company, a private corporation organized and existing under the

laws of the State of Nebraska, mortgaged to the Manufacturers' Trust Company of New York, a private corporation organized under the laws of the State of New York, for the sum of $4,949,100.00, all right, title and interest and privileges of the plaintiff in and to the leasehold interest leased by the Secretary of the Air Force representing the United States of America containing 63.05 acres more or less, as described in said lease, as alleged in Paragraph VI hereof for private gain or profit, to-wit: 4% interest per annum; said mortgage filed the 6th day of February, 1951 and recorded in Mortgage Record No. 63 at page 173 in the Register of Deed's office, Sarpy County, Nebraska, all as shown by Exhibit "B" attached hereto and made a part of this answer by incorporation therein.

XII

The plaintiff further alleges that 611 units were constructed on the above described property; that said units were constructed by Carl C. Wilson, Inc.; that Carl C. Wilson, President, Offutt Housing Company herein, is one and the same person as Carl C. Wilson, President of Carl C. Wilson, Inc.

XIII

The defendant further alleges that Offutt Housing Company purchased and caused to be delivered, household appliances consisting of refrigerators, electric ranges, [fol. 31] washers and dryers and that the plaintiff, Offutt Housing Corporation, entered into conditional sales contracts filed in the office of the County Clerk of the County of Sarpy, Nebraska, as follows, to-wit:

Filed			
1-16-52	Feneral Motor Acceptance Corporation,	appliances	$17,228.50
1-16-52	" " "	appliances	16,226.00
1-24-52	Firsr Nat. Bank of Omaha	gas dryers	8,701.86
1-24-52	" " " "	refrigerators	32,735.50
2-21-52	General Motors Accept. Corp.	furniture	15,638.00
3-24-52	Major Appliance Company	ranges, refrigerators washers	13,294.00
4-3-52	First National Bank	dryers	1,762.48
4-3-52	First National Bank	refrigerators	14,333.66
4-21-52	First National Bank	dryers	4,447.63

XIV

That on the 10th day of March, 1952 said construction was approximately 75% complete; that the Assessor of the County of Sarpy, Nebraska, on or about the 23rd of June, 1952, assessed the interest of the plaintiff in and to said units at $755,785.00; that said assessor further assessed the plaintiff for household appliances at $69,695.00, and that said assessor further assessed the plaintiff for office furniture and fixtures at $205.00, all as personal property of the plaintiff; that pursuant to law, levies were set and taxes figured on said valuations; that said tax became due and payable on the 1st of November, 1952, of which one-half thereof became delinquent on the 1st of December, 1952 and the second half on the 1st of July, 1953; that no part of said taxes levied thereon have been paid and that said taxes are now delinquent and unpaid.

XV

That on or about the 26th day of July, 1953 an agreement was entered into between Douglas County Bank of Omaha, Nebraska, a Corporation and the plaintiff, Offutt Housing Company, a Nebraska corporation, and Carl C. Wilson, Inc., [fol. 32] a Nebraska corporation, wherein it is stated that Offutt Housing Company is the owner of 611 housing units located at Offutt Field, Sarpy County, Nebraska, constructed by it under the provisions of the Wherry Act with said real estate being subject to an F.H.A. mortgage held by the Manufacturers' Trust Company of New York, said agreement providing for the assignment of rents for the payment of $28,771.56, the payment due the 1st of July, 1953 on said mortgage note, said mortgage note having provided for the payment of interest and principal on the 1st day of July, 1952 in the amount of $22,683.37, said agreement being recorded on the 12th day of August, 1953 and recorded in Miscellaneous Record No. 16 at page 277 in the office of the Register of Deeds of the County of Sarpy, Nebraska.

XVI

The defendant further alleges that the plaintiff, Offutt Housing Corporation and the persons occupying said

~~multiple family dwellings~~, are entitled to all the privileges and services of the County of Sarpy and State of Nebraska; that the plaintiff ~~and said occupants~~ are entitled to the privileges of using the Courts of the County and State; that, ~~as shown by the pleadings herein~~, the plaintiff, Offutt Housing Corporation, has had available for its use the services of the County Clerk of the County of Sarpy and the Clerk of the District Court.

XVII

The defendant further alleges that the 611 multiple family dwellings and household appliances, to-wit: refrigerators, electric ranges and washing machines, were purchased, constructed and located in Sarpy County, Nebraska by the plaintiff, said Offutt Housing Corporation; that the plaintiff, said Offutt Housing Company, is the owner of said 611 multiple family dwellings and household appliances in Sarpy County, Nebraska, located on the real estate de- [fol. 33] scribed in the lease agreement set out in Paragraph VI hereof; that said property is subject to assessment and taxation in Sarpy County, Nebraska; that no public funds of the United States of America were appropriated or expended for the purchase, erection or acquisition of said property; that said property is not the property of the United States of America; that there has been no assessments or tax levied on the property of the United States of America and that the tax levied, as alleged in Paragraph XIV hereof will not be a burden on the government of the United States of America or interfere in the performance of any Federal function.

XVIII

The defendant further alleges that the laws of the State of Nebraska, as set out in Section 77-1728 Revised Statutes of Nebraska for 1943, that any person claiming any tax to be invalid shall pay the same to the County Treasurer under protest and make his claim therefor, as provided in Sections 77-1729-33, inclusive, and that the Court herein has not jurisdiction to determine or render judgment herein.

XIX

The defendant further alleges that there is a defect in proper parties defendant herein in that the State of Nebraska, ~~Auditor of Public Accounts of the State of Nebraska~~, Assessor of the County of Sarpy, Nebraska, the Manufacturers' Trust Company, mortgagee, and the United States of America are necessary and proper parties defendant and have not been made parties defendant by the plaintiff.

XX

The defendant further specifically denies each and every allegation in said plaintiff's petition contained not hereinafter specifically admitted or specifically controverted.

Wherefore, the defendant prays that the plaintiff's petition may be dismissed at its costs.

[fols. 34-37] County of Sarpy, Defendant. (S.) by Orville Entenman, County Attorney.

Duly sworn to by Orville Entenman. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 38] IN THE DISTRICT COURT OF SARPY COUNTY, NEBRASKA

[Title omitted]

PLAINTIFF'S REPLY TO AMENDED ANSWER OF DEFENDANT, COUNTY OF SARPY—Filed February 17, 1954

Comes now the plaintiff and for reply to the amended answer of County of Sarpy, and

I

Without admitting the materiality thereof, plaintiff admits paragraphs III, IV, X, and XIII of defendant's amended answer.

II

Plaintiff denies the allegations of paragraphs XII, XVI, XVII, XVIII and XIX of defendant's amended answer.

III

Plaintiff denies all other allegations contained in defendant's amended answer, save which may hereinafter be admitted to be true.

IV

As to paragraph V of defendant's amended answer, plaintiff admits that the 81st Congress of the United States enacted Public Law No. 211, known as the Wherry Housing Act, which Act was approved on August 8, 1949, and that said Act, as it was amended between August 8, 1949 and March 10, 1952, appears as section 1748 to 1748-i, 1952 Cumulative Supplement to 12 United States Code Annotated. Plaintiff denies any conclusions of the defendant contrary to the import or meaning thereof.

V

As to paragraphs VI, VII, VIII and IX of defendant's [fol. 39] amended answer, the plaintiff admits the execution of a lease dated January 18, 1951, and alleges that an exact copy of said lease is attached to plaintiff's amended and supplemental petition, marked Exhibit C and made a part thereof. Plaintiff denies any conclusions of the defendant contrary to the import or meaning of such lease.

VI

As to paragraph XI of defendant's amended answer, the plaintiff, without admitting the materiality thereof, admits that on the 1st day of February, 1951, the plaintiff executed a mortgage in favor of Manufacturers Trust Company, a corporation organized and existing under the laws of the State of New York, and that a copy of said mortgage was filed in the office of the Register of Deeds of Sarpy County, Nebraska on February 6, 1951, and recorded in Mortgage Records No. 63, at page 173, of the records of Sarpy County, Nebraska, and that Exhibit B attached to the defendant's

amended answer and made a part thereof is an exact copy of such mortgage so executed and so recorded. Plaintiff denies, however, any conclusions of the defendant contrary to the import or meaning of such instrument.

VII

As to paragraph XIV of defendant's amended answer, the plaintiff admits that on the 23rd day of June, 1952, the county assessor of the County of Sarpy, Nebraska, executed and returned a purported 1952 personal property schedule, a copy of which is attached to plaintiff's amended and supplemental petition, marked Exhibit D and made a part thereof. The plaintiff further admits that the purported taxes levied on the basis of such purported return are unpaid. The plaintiff, however, alleges that such purported levy and purported taxes based upon such purported tax return are illegal, invalid, null and void and of no effect. Plaintiff further alleges that the property described in the purported personal property tax schedule (Exhibit D at- [fol. 40] tached to plaintiff's amended and supplemental petition) was on March 10, 1952 and on June 3, 1952 located on Offutt Air Force Base.

VIII

As to paragraph XV of defendant's amended answer, the plaintiff, without admitting the materiality thereof, admits that on the 28th day of July, 1953, the plaintiff and Carl C. Wilson, Inc. entered into a limited assignment of rents in favor of Douglas County Bank of Omaha, which assignment of rents was prepared by and worked by counsel for Douglas County Bank of Omaha, a copy of which is referred to in paragraph XV of defendant's amended answer. Plaintiff alleges, however, that the execution of such instrument in no way changed the ownership or taxability of property involved in this action and further alleges that said instrument was released by Douglas County Bank of Omaha on the 11th day of February, 1954, a copy of said release being recorded in Miscellaneous Records 16 at page 472 in the office of the Register of Deeds of Sarpy County, Nebraska, on the 13th day of February, 1954.

IX

The plaintiff further specifically denies each and every allegation in the defendant's, County of Sarpy, amended answer not herein specifically admitted or specifically controverted.

Wherefore, plaintiff prays for relief prayed for in its amended and supplemented petition.

(S.) Charles S. Reed, Howard W. Selling, Attorneys for Plaintiff.

[fol. 41] *Duly sworn to by Carl C. Wilson. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 42] [File endorsement omitted]

IN THE DISTRICT COURT OF SARPY COUNTY, NEBRASKA
OFFUTT HOUSING COMPANY, a Corporation, Plaintiff

vs.

COUNTY OF SARPY and ROBERT M. EBY, Treasurer of County of Sarpy, Nebraska, Defendants

JUDGMENT AND DECREE—June 15, 1954

Now on this 15th day of June, 1954, the same being one of the days of the May 1954 term of court, this cause came on to be heard on the amended and supplemental petition of the plaintiff, the answer of the defendant, Robert M. Eby, the amended answer of the defendant, County of Sarpy, and the plaintiff's reply to the amended answer of the defendant, County of Sarpy, and the evidence, and was submitted to the court, and the court being fully advised in the premises finds generally for the plaintiff and against the defendants, and each of them.

After due consideration of the evidence, the court finds:

That the allegations contained in plaintiff's amended and supplemental petition are true.

That the allegations contained in paragraphs III, X, XIII, XV and XVI of the amended answer of the defendant, County of Sarpy, are true and that the allegations contained in paragraphs VI, VII and VIII of plaintiff's reply to amended answer of defendant, County of Sarpy, are true and that the deed filed on April 12, 1950 and recorded in Deed Records 67 at page 537 in the office of the Register of Deeds of Sarpy County, Nebraska, was executed by the grantor named therein on the 21st day of October, 1949.

The court further finds:

That the court has jurisdiction of the subject matter of the action.

[fol. 43] That the court has jurisdiction over the parties to this action.

That the controversy between the parties is justiciable in this action.

That there is no defect of essential parties.

The court specifically finds:

That Offutt Air Force Base is a military reservation of the United States and it has, at all times herein involved, been actively and exclusively used as a purely military installation.

That the Department of the Air Force has certified Offutt Air Force Base to be a permanent part of the United States Air Force and that the Secretary of the Air Force, previous to the erection of the housing units involved, certified that such housing project was necessary for the use of personnel assigned to Offut Air Force Base.

That all property involved is located on Offutt Air Force Base.

That the land on which Offut Air Force Base is located is real property of the United States.

That the rental units involved were needed at Offutt Air Force Base and that the rentals therefor are substantially less than the rentals for comparable private available housing.

That the project was initiated by the Commanding Officer of Offutt Air Force Base determining the rental housing need for its military personnel, the later approval of the

project by the Secretary of Air, followed by determination of project details by the Air Force and the Federal Housing Administration, after which prospective sponsors were invited to provide the approval number of rental housing units, after which Carl C. Wilson, Inc., one of four prospective sponsors, was selected, Carl C. Wilson, Inc. not being the preference of the Commanding Officer of Offutt Air Force Base. Thereafter, in accordance with existing law and Federal Housing Administration regulations, the sponsor caused the plaintiff corporation to be organized to act as lessee for the military rental housing project.

That the housing project was conceived and planned and [fol. 44] that the additional necessary land was secured through the Omaha Chamber of Commerce before any sponsor or lessee was selected or established.

That the maximum rentals to be paid by the occupants of the housing project were determined on the basis of the ability of prospective military tenants to pay, and that before the sponsor of the project was selected, the prospective lessee, the plaintiff, was required to conform to the rental schedule prescribed by the Department of the Air Force of the United States of America.

That the amount of rentals which the plaintiff may charge for occupancy of the housing units involved was fixed by the Federal Housing Administration Commissioner in accordance with Title VIII of the federal National Housing Act and the regulations of the Federal Housing Administration Commissioner with concurrence of the Department of the Air Force of the United States of America.

That the rentals to be paid by the occupants of the rental housing units in said project cannot be raised without the consent of the Department of the Air Force of the United States of America.

That the housing units and the equipment involved is presently leased only to military personnel of the United States of America assigned to duty at Offut Air Force Base.

That the amount of rentals charged to the occupants of the rental housing units were fixed upon the assumption that the property was not taxable and that, in the event the property involved in this action should be found to be taxable, rentals paid by Air Force personnel tenants will be increased.

That the eligibility of Air Force personnel to rent the property involved is determined by the Strategic Air Command Base Commander.

That the property involved is not located in any municipality or school district.

[fol. 45] That upon receipt by Governors of the State of Nebraska of notification letters, copies of which were introduced in evidence as Exhibits 2 and 2-A, the United States of America assumed exclusive jurisdiction over Offutt Air Force Base and over all property involved in this action, and that upon receipt of such notification letters, the State of Nebraska, and its political subdivision, County of Sarpy, ceded all taxing jurisdiction over Offutt Air Force Base to the United States of America and all property located thereon.

That the United States of America has never by legislative action consented to the defendant, County of Sarpy, taxing the buildings involved in this action or the appliances and personal property of the plaintiff located therein.

That the United States of America has never by legislative action consented to the defendant, County of Sarpy, taxing any tangible personal property of the plaintiff located on Offutt Air Force Base.

That the mortgage executed by the plaintiff is not a mortgage on the fee title to the land leased to the plaintiff.

That on June 23, 1952, the rental housing units involved in this action were fully completed and that all 611 rental housing units involved therein had been certified as ready for occupancy and that on said date, a large number of such rental units were already occupied by Air Force personnel assigned to Offutt Air Force Base.

That in connection with the plaintiff being established as lessee of the rental housing project on Offutt Air Force Base and being granted a lease of the land on which the project was to be erected, the Department of the Air Force required the plaintiff to agree that the rentals paid by the tenants of the rental housing units should include the use of household appliances to be furnished by the plaintiff, including gas ranges, refrigerators, washers and dryers.

[fol. 46] That on March 10, 1952, a number of the buildings and rental housing units therein had been fully com-

pleted and were occupied by Air Force personnel assigned to Offutt Air Force Base and that on said date, all of the buildings had been structurally completed, except for some remaining painting, plastering and plumbing connections in some of the rental housing units contained therein.

That the plaintiff, in 1952, did not list with the County Assessor of Sarpy County any property involved in this action as personal property of the plaintiff subject to taxation in Sarpy County and that on June 23, 1952, the County Assessor of the defendant, County of Sarpy, without plaintiff's consent or authority, executed a purported "Business and Professional Schedule of Personal Property," purported to be owned by the plaintiff and subject to taxation in Sarpy County as personal property of the plaintiff and that the property described in such Business and Professional Schedule is the property involved in this action.

That said schedule listed under subdivision F thereof miscellaneious personal property at a valuation of $205.00 and household appliances at a valuation of $69,695.00 and that in such schedule in subdivision I thereof, there was listed "Improvements on leased land" at a valuation of $755,785.00.

That the improvements were assessed at the assessor's estimate of the value of the buildings, the same as if the plaintiff had a full and unqualified ownership of the buildings.

That on the basis of such schedule, purported taxes were levied against the plaintiff in the amount of $10,783.45. That $9,870.55 of such tax covers improvements on leased land at Offutt Air Force Base and the balance of the tax, or $912.90, covers taxes levied against the plaintiff on property listed under subdivision F of such "Business and Professional Schedule of Personal Property."

That no part of said taxes have been paid.

[fol. 47] That prior to the bringing of this action, the defendant, Robert M. Eby, Treasurer of the defendant, County of Sarpy, by a letter dated April 13, 1953, threatened to issue a distress warrant to collect the purported taxes involved.

That plaintiff is entitled to the relief prayed for.

Therefore, it is declared, determined and adjudged that:

Offutt Air Force Base is property reserved or acquired and used by the United States for military purposes.

The State of Nebraska and its political subdivision were, in 1952, and thereafter, without power or authority to tax tangible property located at or upon Offutt Air Force Base.

Offutt Air Force Base, the land on which it is located, and rental housing improvements thereon were, on June 23, 1952, and at all times thereafter, property of the United States, not subject to taxation by the State of Nebraska or Sarpy County.

On June 23, 1952, and at all times thereafter, rental housing improvements on Offutt Air Force Base were real estate and not personal property and was a part of the land on which Offutt Air Force Base is located.

The land on which Offutt Air Force Base is located was not, during any time during 1952, a part of public lands.

The purported 1952 assessment of "Improvements on leased lands . . . $755,785.00" as personal property of the plaintiff was illegal, null and void and of no effect.

The purported 1952 levy of taxes against the plaintiff by the defendant on improvements on leased land of the purported value of $755,785.00 was illegal, null and void and of no effect.

The purported 1952 assessment of property listed in Schedule F of the purported personal property tax schedule as property subject to taxation in Sarpy County under the laws of the State of Nebraska was illegal, null and void and of no effect.

The purported property of the plaintiff listed under Schedule F of the purported personal property tax schedule as property subject to taxation in Sarpy County, Nebraska, [fol. 48] was located on Offutt Air Force Base and was not subject to taxation by the defendant, County of Sarpy.

The purported 1952 levy of taxes against the plaintiff on the property listed in Schedule F of the purported personal property tax schedule was illegal, null and void and of no effect.

The purported personal property tax schedule made by the County Assessor of Sarpy County showing personal

property of the plaintiff subject to taxation in Sarpy County under the laws of the State of Nebraska should be corrected to eliminate therefrom improvements on leased land of the valuation of $755,785.00.

The purported personal property tax schedule made by the County Assessor of Sarpy County showing personal property of the plaintiff subject to taxation in Sarpy County under the laws of the State of Nebraska should be corrected to eliminate therefrom property listed in Schedule F thereof.

It is further ordered, adjudged and decreed that:

The defendant, County of Sarpy, its officers and agents, be perpetually enjoined from including in its tax assessment schedules any rental housing improvements on Offutt Air Force Base as personal property of the plaintiff in Sarpy County.

The defendant, County of Sarpy, its officers and agents, be perpetually enjoined from including in its tax assessment schedules any furniture, fixtures, tools, equipment or household appliances located on Offutt Air Force Base as personal property of the plaintiff taxable in Sarpy County.

It is further ordered, adjudged and decreed that the Defendant, County of Sarpy, its officers and agents, and the defendant, Robert M. Eby, Treasurer of Sarpy County, be perpetually enjoined from levying any tax against the plaintiff covering improvements located on Offutt Air Force Base or enforcing any tax thereon against the plaintiff.

It is further ordered, adjudged and decreed that the defendant, County of Sarpy, its officers and agents, and the [fols. 49-63] defendant, Robert M. Eby, Treasurer of Sarpy County, be perpetually enjoined from levying any tax against the plaintiff covering furniture, fixtures, tools, equipment or household appliances located on Offutt Air Force Base.

It is further ordered, adjudged and decreed that the purported personal property tax schedule made by the County Assessor of Sarpy County on June 23, 1952 be corrected to eliminate therefrom improvements on leased land of the valuation of $755,785.00.

It is further ordered, adjudged and decreed that the purported personal property tax schedule made by the County Assessor of Sarpy County on June 23, 1952 be corrected to

eliminate therefrom furniture and fixtures—tools and equipment—household appliances [redacted] of $69,900.00.

It is further ordered, adjudged and decreed that the plaintiff recover from the defendants its costs in this action taxed at $28.35.

By the Court, (S.) John M. Dierks, Judge.

OK. Orville Bittenman, County Attorney, 14 June, 1954.

[fols. 64-66] In District Court of Sarpy County

Excerpts from Bill of Exceptions

Judge's Certificate to Bill of Exceptions—October 1, 1954

I Hereby Certify that the within and following Bill of Exceptions in two volumes described as: Volume I, Testimony, Pages 1 to 197, inclusive; Volume II, Exhibits, Pages 198 to 226, inclusive; contains all of the evidence offered, and all of the evidence given, both oral and documentary, upon the trial of this cause, together with all oral motions, stipulations, offers, objections, and rulings of the Court thereon; that the trial was had at the time and place stated herein; and upon application of the Plaintiff this Bill of Exceptions is allowed by me and ordered to be made a part of the record in this case.

Dated at Papillion, Nebraska, this 1st day of October, 1954.

(S.) John M. Dierks, District Judge.

[fol. 67] Proceedings:

Monday, April 19th, 1954, 9:00 A.M.:

* * * * * * *

Offers in Evidence

Mr. Reed: I suggest that plaintiff and defendant join in submitting this stipulation.

Mr. Entenman: Yes, the defendant joins in introducing into evidence Exhibit No. 1.

* * * * * * *

By the Court: It will be received.

* * * * * * *

Mr. Reed: Exhibit 2, Sir, is Exhibit "A" referred to in the stipulation and the plaintiff's petition, and Exhibit 2-a is Exhibit "A-1" referred to in the plaintiff's petition and in the stipulation; and plaintiff offers in evidence Exhibits 2 and 2-a. Any objection?

Mr. Entenman: I have no objection.

Mr. Reed: And I will ask the reporter to mark this [fol. 68] exhibit as Exhibit B.

* * * * * * *

Mr. Reed: I would like to state to the Court that Exhibit 3, except for the attestation of the Nebraska FHA Director, is the same as the Exhibit B attached to plaintiff's petition and as Exhibit B as referred to in the stipulation. Do you agree to that, Mr. Entenman?

Mr. Entenman: Yes.

Mr. Reed: And plaintiff will offer in evidence Exhibit 3.

By the Court: Exhibits 2, 2-a and 3 will be received.

* * * * * * *

Mr. Reed: The exhibit which the reporter has marked Exhibit No. 4 is referred to in the petition as Exhibit "C", the lease, and is referred to in the stipulation as Exhibit "C". Do you agree to that?

Mr. Entenman: Yes.

* * * * * * *

By the Court: It will be received, Exhibit 4.

[fol. 69]

* * * * * * *

Mr. Reed: Mr. Entenman, might we stipulate that Exhibit 5 is an exact copy of an exhibit referred to in the

petition as Exhibit "D" and referred to in the stipulation as Exhibit "D", and that it is in the handwriting of Ernest Neilsen, the County Assessor of Sarpy County?

Mr. Entenman: Yes. No objection.

Mr. Reed: Plaintiff will offer in evidence Exhibit 5.

By the Court: It will be received.

Mr. Reed: That is the assessment schedule.

. . . . . .

Mr. Reed: The Exhibit 6 is the 1953. If it please the Court, this Exhibit 6 is not referred to in the petition, and it is not referred to in the stipulation. Exhibit 6 is the return schedule, same form as Exhibit 5, for the year 1953; and my theory in offering it in evidence is to show the theory of necessity for injunctive relief and to show the amount that would be involved in the next subsequent year. It is in the handwriting of the assessor.

By the Court: Not made voluntarily, but in the handwriting of the assessor.

[fol. 70] Mr. Reed: That is right.

Mr. Entenman: That is not included in our stipulation. I didn't know until now that he was going to introduce the 1953. I would object to its being used here or in any way determining the correctness of the 1953 schedule.

By the Court: It will be received for the limited purpose for which it was offered; to show that the assessor proceeded to assess the property involved in each succeeding year by having done so in 1953, and I suppose in a day or so there will be one for 1954.

Mr. Reed: That is right.

Mr. Entenman: That will not be litigated, though, in any way with the——

By the Court: No, not involved in the litigation on the merits.

Mr. Reed: All right, plaintiff offers in evidence Exhibit 6, and may we agree before the Court rules on it that it is in the handwriting of the County Assessor, and is a copy of the involuntary assessment of the plaintiff in 1953?

Mr. Entenman: Well, I presume that it is.

By the Court: Well, is the assessor present in court?

Mr. Entenman: No, he isn't. In fact he's very busy. If I could have just a very few minutes to check it.

By the Court: Well, we will defer receiving it in evidence until you have had a chance to check it to see if it [fol. 71] is in his handwriting; but under those circumstances it will be received.

. . . . . .

Mr. Reed: If it please the Court, Exhibit 7 is a copy of a letter written and mailed by the defendant Robert M. Eby, County Treasurer of Sarpy County, to the addressee shown, on or about the date shown in the letter; and we have stipulated that this is a photostatic copy of a letter signed and mailed to the shown addresse- at such time, have we not, Mr. Entenman?

Mr. Entenman: Yes sir.

Mr. Reed: Plaintiff will offer in evidence Exhibit 7.

Mr. Entenman: No objection.

By the Court: It will be received.

. . . . . .

Mr. Reed: It is stipulated between the parties that Exhibit No. 8 is a photostatic copy of the articles of incorporation of Offutt Housing Company, and the certificate of the Secretary of State of Nebraska, and on the reverse side thereof shows the filing of a copy in the office of the County Clerk of Douglas County, Nebraska. Do [fol. 72] you agree to that?

Mr. Entenman: And that they are the plaintiffs herein.

Mr. Reed: Well, they purport to be. That is all right. And that the exhibit shows the articles of incorporation of the plaintiff corporation.

By the Court: It will be received.

Mr. Reed: Plaintiff offers in evidence Exhibit 8.

. . . . . .

WILLIAM R. GOODALL, called as a witness on behalf of the Plaintiff, being upon his oath first duly sworn, testified as follows:

Direct examination.

By Mr. Charles S. Reed:

Q. What is your name, please?

A. William R. Goodall, Jr.

Q. What is your business or profession, Sir?

A. I am the chief, Real Estate Division, for the Engineers, Missouri River Division.

[fol. 73] Q. Does Offutt Air Force Base come within your geographical—is it within the geographical limits of the jurisdiction of your work?

A. Yes sir.

Q. And what is the connection between your office and Offutt Air Force Base?

A. The Corps of Engineers acts as real estate agent for all branches in the Army, Air Force and Atomic Engergy Commission.

Q. And that includes the installation at Offutt Air Force Base?

A. Yes.

Q. And how long have you been in your present position, Col. Goodall?

A. Since 1944.

Q. And were you in that same type of work when the Wherry Housing was built on Offutt Air Force Base?

A. I was.

(Plaintiff's Exhibit No. 9 marked for identification by the reporter.).

Q. Col. Goodall, I wish you would tell the Court what Exhibit 9 is.

A. This is a map showing the real estate comprising Offutt Air Force Base up to February, 1953.

Q. Give me the exact date in February it was last certified.

A. February 3rd, 1953.

[fol. 74] Q. All right. And that map, then, or those symbols, show the outside perimeter of Offutt Air Force base up to the 1953 date that the map was last modified?

A. Yes.

Q. And incidentally, then, shows all of Offutt Air Force Base; the land within that broken line marking shows all of the real estate which comprised Offutt Air Force Base at the time of the last revision?

A. Yes.

Mr. Reed: Plaintiff will offer in evidence——

Mr. Entenman: I would like to cross-examine the witness.

By the Court: You may do so.

By Mr. Entenman:

Q. Is it true, Sir, that the confines of this map, as he stated here, that is also the federal property belonging to the United States Government?

[fol. 75] A. Yes.

Q. And is that the title that it has, or the name that it has, "Offutt Air Force Base"? all of it?

A. Yes.

Q. And this map here, then, shows all property that is owned by the United States Government in this area now?

A. As of that date, it does.

Q. As of 1953?

A. Yes sir.

. . . . . .

Q. Does this map show the property that was leased to the Offutt Housing Company, the plaintiff in this action?

. . . . . .

[fol. 76] A. I can't answer as of my own personal knowledge. I can perhaps answer it this way: That tract No. 48 was acquired from the Omaha Chamber of Commerce, and it has always been my understanding that it was acquired for the purpose of building family quarters under the Wherry Housing.

Q. But this map itself doesn't show the exact tract of the lease, or the described property that was leased?

A. No, we didn't prepare the lease in my office.

Q. And it isn't shown on this map? I mean this Tract 16 and Tract 48 there, they are not the property that was leased, are they?

A. You couldn't tell it from this map as to which property was leased.

Mr. Entenman: Couldn't tell it. All right, I am going to object to this exhibit; I don't see that this helps us in any manner; it co-fuses the issues.

By the Court: What is the purpose of using it, Mr. Reed?

Mr. Reed: The purpose of——

By the Court: It is not the property involved.

Mr. Reed: It will be supplemented. The purpose of using it is this: The purpose of using it is to essentially show that all of the housing involved here, and the property leased, is within the perimeter. Now, the only two things we have to put together, the lease is now in evidence, with the descriptions, and that map shows corners and measurements; and with those two exhibits you can deter- [fol. 77] mine how much of that was covered by this lease to the plaintiff corporation, because you have now in evidence the lease, which gives the legal description, and if you will refer to that you will find it is all within the perimeter of Offutt Air Force Base.

By the Court: Is this a qualified real estate expert? Are you going to have him do that?

Mr. Reed: No.

By the Court: How can I do it?

Mr. Reed: Well, you get your description there, and your corners are shown there, and you can show, and I intend to show, I want to say to you, that this is a preface to having the Base Commander testify as to the location of the housing. This is preliminary to that. We have another map that shows the location of the housing, but I want to get that in as the official certified map of the engineers as preliminary to the other exhibit.

By the Court: All right. Objection overruled.

* * * * * * *

By Mr. Reed:

Q. Now, I would like to ask; just explain in general the entries that are shown on that map. You don't have to discuss them, but so that anybody will understand what the entries are about the tracts, and so forth, along the site of that map.

[fol. 78] Mr. Entenman: I object to that. I believe they speak for themselves.

Mr. Reed: No, they don't.

By the Court: Does it bear a legend, or not? that explains it?

Mr. Reed: The things that are legend I am not asking about, Sir.

A. The Tract register shows the tract number, the former owner, the acreage, and the estate which has been acquired; in this case it has all been acquired in fee; and then there are various notations out to the right.

By Mr. Reed:

Q. Now, those are legends.

Mr. Entenman: I am going to object to that "acquired in fee" there, because I think that would be calling for a conclusion of this witness. The title hasn't been introduced here in evidence, any record of that, and it's not the best evidence, if he is going to add that word "in fee" in here, how it was acquired.

By the Court: That can be stricken as not the best evidence; the record itself is the best evidence.

. . . . . .

Q. Now, incidentally, as to this matter of title, isn't it a [fols. 78-80] fact that the U. S. Engineers, in acting as real estate agents in this instance for the Air Force, determines the title to the property, who has the title to Offutt Air Force Base?

A. You mean who has the title? If the Army——

Q. No. Doesn't that come within the scope of the examination, or supervision, of the United States Army Engineers to determine the nature of the title held by a military installation within your district?

A. Yes sir. We always buy abstracts or certificates of title and submit it to the Attorney General for opinion.

Q. Now, according to the records of your office, if you know, who has title to the ground described within those perimeter markings you have previously described?

Mr. Entenman: I object to that as calling for a conclusion and not the best evidence. They can't just put one individual here to give his opinion; that might be invading the province of the Court, I am quite sure it would be.

. . . . . .

[fol. 81] By the Court: Your objection as not being the best evidence is absolutely good; it's not the best evidence of title.

. . . . . .

Q. All right. And your office is the United States Department of Engineers, which acts as real estate agent for the [fol. 82] United States in these defense projects?

A. Yes.

Q. All right, according to the records of your office, based upon abstracts and the records of your office; according to the records of your office, who is the owner of the land included in the perimeter shown on that map, Exhibit 9?

Mr. Entenman: The same objection, your Honor. In the first place the rest of the tract here, outside of the leased premises, is not in issue, it would be irrelevant, immaterial and have no bearing on the issues of this case, or any determination here who has title to the rest of the base.

Mr. Reed: I am going to get that other map, then, after I get this map in, Sir.

Mr. Entenman: And as to the title to the tract here, I made the same objection before, that the best evidence of that is the deed itself.

By the Court: There is no question about that, if you are going to insist on it.

Mr. Entenman: As a matter of fact I think they are trying to show right here, and I want the record to show that, that the records of the title to the real estate involved in here

are controlled by the Register of Deeds Office of Sarpy County, and not by the Engineers Office.

. . . . . .

[fols. 83-85] By the Court: Yes. It is not the best evidence, what their record shows as to the title. The best evidence is the deed records of Sarpy County, Nebraska; if you want to insist upon it, and apparently Mr. Entenman does want to insist upon it,

. . . . . .

[fol. 86] Mr. Reed: Well, that is what I want to know.

I am going to offer to show by this witness what their file shows as to title, based upon an audit of acquisition of title and examination of titles to all these tracts as they are acquired by the United Sattes.

Do you have any objection to that offer?

Mr. Entenman: I do. I object to that. The record is right down here in this clerk's office; closer than any Engineers office; and that record can be brought in here. Why they don't want to introduce those deeds, I don't know.

Mr. Reed: There isn't anything dire about it, except I have to go down there and get certified copies of about thirty some tracts; and they are all included in this audit file, all in one package.

Mr. Entenman: There is not that much property involved in this. It only shows two tracts right on the map.

Witness Goodall: Our files would contain copies only; they wouldn't contain the original document.

Mr. Reed: Well, if your Honor please, anybody that thinks it's just this land acquired by the Omaha Chamber of Commerce involved in this housing is badly mistaken; there is some of the old reservation included in this housing lease.

By the Court: Well, what's the difference? I would think you could stipulate that part of it is and part of it was acquired from the Chamber of Commerce; but if you want [fol. 87] to insist upon objecting, go ahead. Not the best evidence; is that your objection, Mr. Entenman?

Mr. Entenman: Yes.

By the Court: The objection as not the best evidence will

be sustained. But I repeat that I think you ought to be able to stipulate on such a fact as that.

Mr. Reed: Will you stipulate, Mr. Entenman, that housing involved in this action is located upon land the title to which is in the United States of America.

Mr. Entenman: No; because I want that deed in here.

By the Court: Why don't you put in your stipulation that it came through the Chamber of Commerce? Apparently that is what he wants in the record.

Mr. Entenman: That is right. I don't care about the other.

By the Court: What do you want to keep it out for? I am going to let it in,——

Mr. Reed: Wait a minute! I am——

By the Court: —so the Supreme Court will have the whole picture here; that part of this housing project is on land acquired by the Omaha Chamber of Commerce——

Mr. Reed: That's right.

By the Court: —and donated to the Offutt Housing for the very purpose. I think if you will agree to that Mr. Entenman will not insist upon objecting.

* * * * * * * * *

[fol. 88] Col. A. J. Beck, called as a witness on behalf of the plaintiff, being upon his oath first duly sworn, testified as follows:

Direct examination.

By Mr. Charles S. Reed:

Q. What is your name?

A. Col. A. J. Beck.

Q. You are a Colonel in the United States Air Force, Col. Beck?

A. Yes sir.

Q. And you are Base Commander at Offutt Air Force Base?

A. Yes sir.

Q. And how long have you been Base Commander?

A. Since the 24th of May, 1952.

Q. And before that were you stationed on the base?

A. Yes sir.

Q. And for what length of time have you been stationed on the base?

A. I have been at Offutt Air Force Base since October of 1948.

Q. You were there during the formation of the plan for the housing involved in this case, were you?

[fol. 89] A. Yes sir.

Q. Now, I wish you would take this exhibit—And, incidentally, Col. Beck, I believe you were an attorney before you went in the Air Force, were you not?

A. Yes sir; I still am an attorney.

* * * * * * *

Q. Now, I wish to hand you Exhibit 10, and tell us what Exhibit 10 is before any further questions.

A. Exhibit 10 is a plot plan of Offutt Air Force Base.

Q. And that is the base that is under your command?

A. Yes sir.

Q. Is it identical, except as to scale, as Exhibit 9?

A. No sir; it is in much more detail.

Q. I know, but is the perimeter the same?

A. I have not compared it——

Q. Well, will you just check it now, to be sure.

A. I doubt if I am able at this time, Mr. Reed, to actually identify each one of these perimeter lines.

Q. All right.

A. I don't believe I am able to do that.

Q. All right.

A. They appear to be the same.

Q. Now, what is shown by Exhibit 10?

A. Well, Exhibit 10, as I say, is a plot plan of Offutt Air [fols. 90-94] Force Base, and shows the perimeter of Offutt Air Force Base and the major items of construction within that perimeter.

Q. Does Exhibit 10 show all of the Offutt Air Force Base?

A. Yes, I believe it does.

* * * * * * *

[fol. 95] Mr. Reed: Now, Plaintiff offers in evidence at this time Exhibit 10.

. . . . . .

[fol. 96] By the Court. It will be received.

By Mr. Reed:

Q. Col. Beck, you are the Base Commander there?
A. Yes sir.
Q. And who is the owner of the area which you designated on Exhibit 10 as the lease area?
A. The United States Government.

Mr. Entenman: Just a minute! I object to that as calling for a conclusion of this witness. It is not the best evidence of the ownership.

By the Court: Well, I will let it stand. It isn't the best evidence.

By Mr. Reed:

Q. Does Exhibit 10 portray—does Exhibit 10 designate all of the Wherry Housing on Offutt Air Force Base?
A. Yes sir.

. . . . . .

[fol. 97] By Mr. Reed:

Q. What is the nature of Offutt Air Base in the defense set-up?
A. It is a permanent installation of the United States Air Force. It is the headquarters of the Strategic Air Command and the 3902nd Air Base Wing.
Q. Is Offutt Air Force Base in its entirety an Air Force military base?
A. Yes sir.
Q. Is it in active use as such?
A. Yes sir.
Q. Has it been at all times since you have been on the Base?
A. Yes sir.
Q. Col. Beck, are you familiar with the steps that were

taken and how this housing became a reality as far as the procedure is concerned? This Wherry Housing on Offutt Air Force Base?

A. Yes sir.

Q. All right, will you tell the Court the procedure that was followed in obtaining this military housing; this very military housing that is involved in this action?

A. I won't be able to remember dates, however, I can give a chronology without dates of just about the procedure.

The requirement for housing being quite obvious, and after the passage of the Wherry-Spence Act, the Base discussed the matter with the Federal Housing Authority, [fol. 98] the State Director in Omaha, and came to an agreement as to the number of units of housing that were immediately required; requested, through channels, consideration of Wherry Housing.

Q. Requested who, through channels?

A. Requested the—ultimately the Secretary of the Air Force, is about as far as I could go. Requested through channels to the Secretary of the Air Force that consideration be given to the construction of Wherry Housing at Offutt Air Force Base to take care of the serious requirement for accommodations of military personnel and civilian employees.

The Base then at a later date received authorization to proceed to get proposals for the construction of this housing, and through various means asked firms to make a proposal for the construction of housing.

Q. Now, may I interrupt? Was that, chronologically, before, or after a certificate being issued by the Secretary of Air?

A. The certificate of necessity, I do not recall whether it was issued—I dare say it was issued after the proposals were requested, as well as I remember.

Q. All right.

A. And that would be the next thing. The Secretary of the Air Force, or one of his assistants, issued a certificate of necessity in which he declared that the housing was necessary; that the base was permanent.

Q. Now to tie this in with the exhibit, I want to hand [fol. 99] you Exhibit 3 and ask you if that is the certificate that you are talking about being issued in this case?

A. Yes sir, this is the certificate.

Q. While it speaks for itself, you might continue your answer there. It shows—What all does it show?

A. Well, it shows the number of units, shows the number of housing units; shows the average monthly rental per family unit that the houses—in other words, what the cost of the housing would be, the average cost, for the tenants; it certifies that the housing is necessary; it also certifies that the base is permanent, and that there is no intention to curtail its activities. That is about the substance of it.

Q. Now, I think chronologically you have brought us down on my general question to the issuance of this certificate. Will you continue with the rest of the narrative, how the housing came into being then?

A. Well, thereafter there was an evaluation of the various proposals that were issued, and those proposals were again sent forward through channels, where there were probably several other evaluations, and ultimately a sponsor was picked, that is, a man who would obtain a lease and who would construct the family quarters.

Q. And isn't it a fact that the Carl Wilson Company was picked as the sponsor in this particular case?

. . . . . .

[fol. 100] A. That is correct.

. . . . . .

Q. Well, you know, don't you, that Offutt Housing Corporation, the plaintiff in this case, was organized in connection with this construction? Do you know that? or not?

A. Yes, I do know that.

. . . . . .

[fol. 101] Q. All right, Colonel, let me ask another question: Colonel, who first determines the eligibility of people to live in Wherry Housing on Offutt Air Force Base?

A. I do, as Base Commander.

Q. Colonel, do you know the type of people, as to their possible connection with the Air, that are tenants in Wherry Housing at Offutt Air Force Base? That just calls for a yes or no answer.

A. Yes sir.

Q. All right. Who are tenants in Wherry Housing at Offutt Air Force Base?

A. Military personnel and their dependents.

Q. Is there any civilian personnel that is even connected with Offutt Air Force Base that are present tenants at the Offutt Air Force Base?

A. At the present time, no.

Q. Yes. During the time that you have been Base Commander has anybody occupied the property as resident tenants except personnel connected with Offutt Air Force Base?

A. No sir.

Q. Now, in your narrative of how one of these projects comes about, I believe you said that when the certificate is issued the Secretary of Air gives the maximum average monthly rentals.

A. Yes sir.

Q. All right. Is there any function of the Air Corps [fol. 102] thereafter as to the amount of rentals that may be charged to tenants of Wherry Housing at Offutt Air Force Base?

A. Well, I, as Base Commander, of course, I wouldn't go along with any increase in rentals. I am afraid I don't quite understand your question.

Q. Now, in this very project here do you know—just answer yes or no—do you know whether the rentals were determined on the assumption that no interest in the project was taxable, or not.

* * * * * * *

A. Yes sir.

* * * * * * *

By Mr. Reed:

Q. What is the fact as to what the assumption was as to the taxability of any interest in the Wherry Housing projects at the time the rentals were fixed to the tenants therein?

* * * * * * *

[fol. 103] A. To my knowledge the FHA in determining the average rental assumed that the project would not be taxed.

. . . . . .

[fol. 104] By Mr. Reed:

Q. Well, do you know, procedurewise in the Air Force Procedure, what will happen in case the sponsor is subjected to tax? Just answer yes or no.

A. I know what the basic procedure provides.

Q. All right. Now I will ask you what the procedure provides as to that.

. . . . . .

[fol. 105] A. The tenants would ultimately pay any additional costs that were placed on the project which resulted in increased rental.

Mr. Entenman: Object to that as calling for pure conclusion and speculation on the part of the witness.

By the Court: Overruled. It seems so obvious that you lawyers could stipulate, I would think. If you have to pay taxes it is going to necessitate an increased charge in the rental. Of course it is.

By Mr. Reed:

Q. Col. Beck, based on your experience, was there any importance so far as the military effort of Offutt Air Force Base is concerned? Were there any results obtained one way or the other by the obtaining of Wherry Housing at that base?

A. Yes sir.

Q. Will you describe that?

A. I think that the obtaining of Wherry Housing, and for that matter I would say the obtaining of any kind of housing, had a marked effect on the morale of personnel who make up the headquarters of Strategic Air Command, and the headquarters of the Base having been here at the time—or, rather, having been one of the first from SAC to come here, the housing situation was rather acute, there was [fol. 106] an extreme shortage of housing, and many plans

or programs or efforts were made to build housing, even to the extent of our forming a plan that we called the SAC Housing Association to building its own housing; to use a military man to build his own house in his off time to house himself; the situation was that acute. So with the advent—I will say again of any housing, whether it be Wherry or other, the morale of the Base increased, improved considerably, and certainly the effeciency of the personnel was improved, having that worry off of their minds.

* * * * * * *

[fol. 107] By Mr. Reed:

Q. I will ask the question again, Col. Beck: State to the Court the type of personnel that is occupying Wherry Housing at Offutt Air Force Base.

[fol. 108] A. Military personnel and dependents.

Q. Military personnel. And the problem of the Air Corps, if there is any, in keeping that type of personnel in the Air Force.

A. Well, one of the very major problems facing the Air Force is reenlistment, retention of experienced personnel, of highly skilled and trained personnel.

Q. Well, stop a minute there and tell us what skill they have to have, and training; just give them.

A. Well, the skills are so many.

Q. All right.

A. It would be an imposition on the Court here to go into them.

Q. Well, generally.

A. Needless to say the flying of aircraft, the particular aircraft that we have today, jet type aircraft, and the particular mission of the Strategic Air Command, that is, the launching and carrying of the atomic weapon, the—well, everything that it takes to get that job done requires people of considerable skill and experience, and that skill and experience is obtained only after extensive schooling, and that of course is quite expensive to the taxpayer, to the Air Force and thus the taxpayer. Once these people are trained—perhaps I could express it best by using an example, a radar specialist is trained, and industry would gobble those people up as fast as they can; those are the people who are

very—probably the best brains in the television field, and [fol. 109] related fields of that type. Thus the Air Force, after training a man, finds itself competing with industry to retain that man, and obviously that man is interested in his standard of living; anything we do to reduce his standard of living causes him to leave the service, not to remain in it, and to go into industry. The net loss is to the Service, of course, and the requirement then is to re-train another man to fill his shoes. In the Air Force we have a four year enlistment, that is the minimum, and it differs from the other services; we find that it is imperative that it be longer than the other services because *because* we can't begin to get utilization out of a man until he is quite thoroughly trained. It is not unusual to train a man for as long as three years, during which time you are putting everything in and getting very little out, if anything out, only to find that you get to use him, actually utilize the skill that you have given him, for one year, and then lose him completely to industry. Frankly, I have come to believe that that is the single most important problem facing the Air Force. If you are going to retain the skill that we need to do the job that the people want their military establishment to do, we are going to have to find some way to keep those people in the service; patriotism is a fine motivation, but it isn't motivation enough, it takes a little bit more than that; a man has a responsibility to his wife, his family, and in discharging that responsibility he quite often will evaluate the [fol. 110] patriotic ideals and evaluate the esprit de corps, the thing that I find so good about the Service, the thing that I like about it, and he will put a certain value on it, and when the balances come in he finds that his family is better off and thus perhaps he is better off if he accepts a position in industry.

Q. Now, what has been the experience at Offutt Air Force Base in whether or not the getting of this Wherry Housing involved here has been a factor in improving that situation, in solving that problem at Offutt Air Force Base?

A. I think we are definitely solving it; it, among a lot of other things that have been done and are being done there have improved the morale at Offutt Air Force Base.

Q. Would you say it was a major factor?

A. Yes sir; very definitely so.

Q. Now with this procedure of obtaining this housing and fixing of rentals—You have lived in Bellevue, haven't you?

A. Yes sir.

Q. And you have rented quarters in Bellevue, have you not?

A. Yes sir.

Q. And you are familiar with the scale of rents outside the base in that area, are you not?

A. Yes sir.

Q. Now, what is the result as to the economy of the rentals as far as the tenants are concerned in Wherry Hous-
[fol. 111] ing as compared with off the base?

A. Oh, Wherry Housing is hard to compare, because there is no housing to compare it with, I mean there are no other houses in Bellevue that I know of; but if you wanted to compare it on a square footage basis, Wherry Housing is perhaps slightly less, a little bit less than a comparable unit, on a square footage basis.

Q. Is the ability of your airmen, your personnel, to pay; is that a basic factor in determining your maximum rentals there?

. . . . . .

A. I don't believe it is, Mr. Reed. I think that the rentals are determined by the computations made, which will tell what the sponsor is going to have to get out of it to pay off that mortgage.

Q. All right. But, now, suppose that that figure would be more than you think your personnel could afford to pay; would you then proceed with Wherry Housing?

A. It couldn't be, Mr. Reed, because the Wherry-Spence Act set a maximum of $9,000.00 per unit; which immediately gives you some tag on rents.

. . . . . .

[fol. 112] Monday, April 19th, 1954, 1:45 P. M.

. . . . . .

By the Court: Have you verified the correctness of Exhibit No. 6?

Mr. Entenman: Yes, I have, your Honor.

By the Court: Exhibit No. 6 will be received, then.

By Mr. Reed:

Q. Col. Beck, how many Wherry Housing units are there on Offutt Air Force Base?

A. 611.

Mr. Reed: Mr. Entenman, may we stipulate that on the basis of the purported 1952 valuation the tax on the property of the plaintiff involved in this action was $10,783.45?

Mr. Entenman: And why don't you put in your stipulation, "including County and State"?

Mr. Reed: All right. The County and State taxes.

And may we also stipulate that on the basis of the 1953 valuations and the assessment of the fifty percent of the [fol. 113] actual value that the County and State taxes would have amounted to $15,865.69.

Mr. Entenman: Which includes both the improvements—add that there—and the household appliances.

Mr. Reed: All right. I was trying to connect that; I said on the same basis as the year before, and they were both in there the year before.

Mr. Entenman: Yes.

By Mr. Reed:

Q. Col. Beck, I think you have testified that the land that was designated on Exhibit 8 as Tract 48, this map here; look at that, please. Are you familiar with my question?

A. Yes sir.

Q. That was the land acquired from the Omaha Chamber of Commerce. Isn't that your testimony?

A. Yes, sir.

Q. All right, when was that land acquired?

A. In the fall of 1949, October.

Q. And by whom was it acquired from the Omaha Chamber of Commerce?

A. By the United States Government.

Q. You were in the Base and active in that transaction at that time, were you not?

A. Yes sir.

Q. Did that acquisition of that tract have anything to do with Carl Wilson or Offutt Housing Company as possibly [fol. 114] participating in the sponsoring of this project?

A. No sir.

Q. As a matter of fact the sponsor was not selected for this project until long after that land was acquired by the United States Government; is that not a fact?

A. That is true.

Q. I think there were four sponsors that submitted propositions, wasn't there?

A. Yes sir.

Q. And was Carl Wilson your top—did you recommend him as the number one preference for sponsor?

A. He was not so recommended.

Q. And will you tell the Court how this land happened to be acquired in this particular way? this tract No. 48?

A. Yes sir.

Mr. Entenman: I object to that question; first, unless there is some showing here that the witness is qualified and knows.

By the Court: Perhaps you better lay a little more foundation.

By Mr. Reed:

Q. All right, give us your knowledge about the background of what I have asked you about; about how it was acquired.

A. At the time of the acquisition of this property I was the Judge Advocate of the Strategic Air Command, and in [fol. 115] addition to that was working on special projects with respect to housing directly for the commanding general, Strategic Air Command, General Le May; subsequently I obtained a replacement for myself as Judge Advocate, and went to the office of the Commanding General, occupying the position of Deputy Chief of Staff, Strategic Air Command, working primarily on special projects, to a large extent the project of housing. I worked with Mr. Reed, and with other members of the Chamber of Commerce, in the acquisition of this particular property; I have personally checked the records of Sarpy County with respect

to the tax matter with reference to this specific property, and have gone over the plat records with the county officials here with regard to this specific property. I further had certain things to do with getting this expedited—shall I say; the acceptance of this property on the part of the United States Government.

Q. All right. Now tell us the background or how this property happened to be acquired by the United States in that particular manner?

A. Well, as I remarked earlier, there was a very serious requirement for housing, and there were several plans at that time for obtaining housing. There is very little real estate on Offutt Air Force Base that is not used—already used or which is not in an over-run of runway and thus not usable for construction. No matter which way we turned—and that was even before the Wherry-Spence Act [fol. 116] was passed, perhaps before it was even thought of—it was obvious that we would have to have some land on which to build anything in the way of housing. General Le May had talked with members of the Chamber of Commerce regarding the acquisition of some property, and subsequently it was obtained; as I recall, the Chamber of Commerce obtained an option on some forty-eight and a fraction acres from, I believe Dr. James, and this option was later exercised and the property deeded to the United States Government, and then accepted by the Secretary of the Air Force on behalf of the United States Government.

Q. Do you know the reason, the objective reason, why it was accepted by the United States?

A. One of the purposes expressly stated was for the construction of housing, although it was not limited to that particular use; it was an acceptance of property, in other words, but that was the purpose.

Q. Now, was there any restriction in the acquisition of this as to who the sponsor would be, as to how the housing would be acquired, or, if it was Wherry Housing, who the sponsor would be?

A. Very definitely there was not.

Q. And the chain of title on this passed directly from the Omaha Chamber of Commerce to the United States of America?

A. Yes.

Q. There was never any transferring in fee to the Offutt [fol. 117] Housing Company or any company that Carl Wilson is connected with?

A. That is correct, Sir.

Q. Now, Col. Beck, in connection with your command do you maintain what is known as a Base Rental Office?

A. Yes sir.

Q. Will you tell the Court what that is? the objects of it, and what you do.

A. Well, the Base Rental Office functions for the purpose of assisting people in obtaining family housing. It functions for me, or through me, or I function through it, perhaps I should say, in designating tenants for Wherry Housing; and the Base Housing Office also obtains listings of family housing in the community; in other words, in Bellevue, or Omaha, or Papillion; in order to help people in locating housing.

Q. Even off-base housing?

A. Yes sir.

Q. Now, Colonel, I believe it is the basic rental, the average rental of Wherry Housing, exclusive of utilities, is $71.04 a month, is it not?

A. Yes sir.

Q. State, if you know—you answered the question on a square footage ba-is, or there was some mention of it—how does that compare percentagewise with square footage space, rental space, off the base? based upon your knowl- [fol. 118] edge of your records of your Base Rental Office.

. . . . . .

A. As I testified earlier, Mr. Reed, the Wherry Housing is cheaper; the exact amount it is cheaper is pretty difficult, because we would have to have a comparison.

By Mr. Reed:

Q. Well, on a square foot basis, that you used?

A. Well, I would say perhaps twenty-five percent less for Wherry Housing than it is for off-base housing; but again we have—there are so many elements to take into consideration that I can't state exactly what it would be; but it is cheaper we know that.

. . . . . .

[fol. 119] Cross-examination.

By Mr. Orville Entenman:

Q. Now, Col. Beck, you testified on direct examination that the area as shown on Exhibit 10 is included in the land or the property belonging to the United States Government was all Offutt Air Force Base.

A. Yes sir.

[fol. 120] Q. Now, does any of that property include what was formerly known as the Martin Bomber Plant?

A. Yes sir.

Q. Is that occupied by the Offutt Air Force Base?

A. Yes sir.

Q. Is there any leases on that building?

A. A part of that building, part of Building "D", which is the Martin Bomber Plant proper, is under the jurisdiction of the Air Materiel Command with offices in Wright Patterson Air Force Base, and is not directly under my jurisdiction, that is, for the purpose of management; and that portion is used for the storage of machine tools, over which I have no jurisdiction.

Q. Do you have any information on how those Machine tools are brought in there? Is there a lease where—or contract with some organization—company?

A. There is a company which operates for, with or in conjunction with the Air Materiel Command; the Tumpane Company.

Q. Was that contract entered into before the lease and the contract with Offutt Housing Company?

A. I could not tell you the status of that contract. The Tumpane Company has been there for some time, has operated there for some time.

Q. Are there any other contracts of the nature of the one with the Tumpane Company, at Offutt Air Force Base, that you know of?

[fol. 121] A. None that I know of.

Q. And then there is the contract or lease agreement with Offutt Housing?

A. Yes.

Q. Now, you stated also on direct examination here that the application or the procedures followed here in securing

this Offutt Housing units, and the construction, was made through channels; now, what did you mean by "through channels"?

A. Well, I meant the normal military channels, which—— You were asking for an explanation of military channels?

Q. Yes.

A. In this case it would go from the 3902nd Air Base Wing to Headquarters, Strategic Air Command, thence to the Chief of Staff, United States Air Force, thence to the Secretary of the Air Force.

* * * * * * * *

Q. Now, do you know the maximum amounts that were granted under this title aid of the Wherry Housing unit?

A. You mean the maximum mortgage?

Q. Yes.

[fol. 122] A. Yes.

Q. And how far is the Offut mortgage from that?

A. I understood it was mighty close to it, or right on it; although I, again, have never divided the mortgage by the number of units.

Q. What?

A. I have never done the math-matics, but it was my understanding that the mortgage was right up to the hilt.

* * * * * * *

Q. Do you know what the amount was that was secured under this contract, and under this proposal?

A. I understood it was pretty close to five million dollars.

Q. Now, you stated that there was more than one proposal. Who else made proposals, then, as you are referring to them?

A. Only one that I can remember offhand, and that was an organization, McCarthy; I believe that was out of New York. I don't remember the names of the other proposed sponsors.

Q. Is there a record kept of that in your office at the Base?

A. There will be on the Base, yes.

Q. Now, in stating that the Offutt Housing was necessary for military personnel and its dependents, what do you mean by dependents of military personnel?

A. Well, I mean—— I consider my wife and my two chil-
[fol. 123] dren my dependents. If my mother was dependent upon me, she would likewise be my dependent; or father, or anyone else who was legally a dependent.

Q. Well now, is it possible then in the Offutt Housing Units there that mothers-in-law or fathers-in-law, or mothers and fathers, may live there too?

A. If they live with the member of the Military Service, and if they are dependent upon that member.

Q. They would have to be dependents, though?

A. Well, yes; unless they were there in a guest status.

Q. And how long might that guest status last?

A. I don't think there is any definite period involved.

Q. Do you know whether or not there is any such regulation, that controls that?

A. Which regulation?

Q. As to Offutt Housing; either by you or the Offutt Housing; the military authorities, or——

A. I really don't get your question. Regulation doing what?

Q. In determining what length of time anyone outside the immediate family may live in those quarters with the military man and his family. Are there any regulations, that you know of?

A. There are none that I know of.

Q. Now, in your testimony on direct examination you testified that this would assist in encouraging reenlistments. What is the average length of time that the airman is stationed at Offutt Field?

[fol. 124] A. Oh, Offutt; I would say roughly two years; perhaps a little bit more.

Q. Then he would be transferred to some other base?

A. Perhaps. You asked for the average. It has nothing to do with any individual. On the average.

Q. And of course that transfer would apply to any airman, whether living at Offutt Housing units or private off the base?

A. Oh, yes.

Q. Bellevue, Omaha, Plattsmouth, or any other.

A. That is true.

Q. Now, you stated in your direct examination this morn-

ing that there were no civilian personnel now occupying Offutt Housing.

A. That is true.

Q. Has civilian personnel occupied that at one time?

A. I am not cert-in. If so, it would have been limited to one or two people; either the electrician, Mr. Babka, or the Base plumber, Mr. Shewan; and I cannot recall whether either one of them has ever lived there. I doubt it, but perhaps they have.

Q. Now, also on direct examination you stated that in the first proposals of this that it was assumed that the project would not be taxed. Did you have anything to do with the drawing of the leases?

[fol. 125] A. No, I did not.

Q. Where were they prepared?

A. The leases, as well as I recall, were prepared at Air Force Headquarters.

Q. And where do you mean by that?

A. Well, the Secretary of the Air Force prepared them; the office of the Secretary of the Air Force.

Q. In Washington?

A. Yes.

* * * * * * *

By Mr. Entenman:

Q. Do you know whether or not these leases were prepared, and did you have any of these copies of these leases or proposed leases at the time you discussed the matters with the ones who were making the proposals? or whatever "through channels" procedure you used over there, as you [fol. 126] testified this morning?

A. I don't remember ever testifying anything even remotely resembling that, Mr. Entenman. I am still a little bit dubious as to what your question is.

Q. Well, were there any porposed leases, any forms of lease that would be entered into with the Offutt Housing, or any person——

A. I have already stated that the leases were made, as far as I know, by the office of the Secretary of the Air Force. I had nothing to do with the preparation of the leases.

Q. Did you ever have a copy of one?

A. Yes, I have had copies of them in my hand on numerous occasions.

Q. All right, did you use those when you were discussing these proposals for Offutt Housing?

A. Well, I am afraid I don't know which proposal.

Q. Well, did you use any of the leases? Did you use any of the information which was contained in those leases? Were you familiar with the lease at all?

A. Yes, I was familiar with the lease, after the lease was executed.

Q. Well, did the lease make any provision for taxes?

A. Specifically, no.

Q. It didn't?

A. No. There is a Paragraph 8 which makes some st[illegible]e-
[fol. 127] ment. I would prefer to read it directly out of the lease, rather than trying to state it.

. . . . . .

[fol. 128] By Mr. Entenman:

Q. When did you have some discussion as to the amount of rentals? When was that?

A. Mr. Entenman, when was it that I had discussion with whom, as to the amount of the rentals?

Q. You testified that you discussed the question of rentals.

A. I would like very much for the reporter to read back a statement to that effect. I recall making no such statement.

Q. You were never present when the rentals were discussed? when the amount of the rentals was discussed?

A. Yes, I have been in discussion regarding the amount of rentals.

Q. Do you know when they were determined, the amount of the rentals, for the individual tenants, now, of the
[fol. 129] dwelling units there?

A. No, I wouldn't recall that.

Q. You don't know when they were set and determined?

A. No, I don't know specifically when they were set and determined.

Q. Were you present?

A. No, I was not present.

Q. Then you don't know whether the question of taxation was involved or not? do you?

A. Yes, I do.

Q. How do you know that?

A. Well, there was a document from the FHA that so indicated, in determining that, that it was assumed the properties would not be subject to taxation.

Q. When was that document presented?

A. I don't know the date of it, but I have seen the document.

Q. Was that before, or after the lease was——

A. I don't know, since I don't know the date of the document, Mr. Entenman.

. . . . . .

[fol. 130] Q. But you are positive that the taxes were not used?

A. I am quite positive that the statement was made in that analysis that there was an assumption that the project would not be subject to taxes.

Q. Did you ever observe what the lease provided for taxes? Do you know what it provided?

. . . . . .

A. I have observed what is in the lease with regard to taxes; paragraph 8, specifically.

By Mr. Entenman:

Q. Did you observe that before, or after you observed the FHA recommendations, or——

. . . . . .

[fol. 131] A. I do not know the date of the document you I have referred to earlier which stated that it was assumed in determining the rentals that the property would not be taxed; therefor, any date relative to that date I would not remember, or would not know.

By Mr. Entenman:

Q. In determining the amount of rent to be paid by the lessor here, the plaintiff, for the leased premises, was that determined through your department in any way?

A. No.

Q. You had nothing to do with the setting of that value, or know nothing about that?

A. No, I had nothing to do with it.

Q. Col. Beck, you state now that the Offutt Housing now is occupied entirely by military personnel or their dependents.

A. And their dependents.

Q. And their dependents.

A. Yes sir.

Q. Now, do you know the total number, including the military personnel and dependents, living there?

A. No, I don't.

Q. Are they all married?

[fol. 132] A. Yes, they are all married.

Q. Well, then you would assume it would be twice the 611, at least; is that right?

A. At least.

Q. Husband and wife.

A. At least that many.

Q. And you have no estimate at all of the number of children?

A. I could give you an estimate as to the number of children, yes.

Q. And what would that be?

A. There are something—roughly two children per family in that project; very close to that.

Q. That would be an average, then?

A. Yes. I remember last year it was something like 1.7, or—I would say fairly close to two. That's a rough guess.

Q. The average then, as a normal deduction, would be four per unit, of the 611.

A. Yes.

Q. Average.

A. Close to that.

Q. Now, Col. Beck, you made a statement on direct

examination as to comparison of rental at the Offutt Housing and off the base, as you call it, in Bellevue, Papillion, or Plattsmouth; now, how do you determine that difference in value?

A. Based on knowledge that I have, both personal ob- [fol. 133] servation, discussion with other people, and on the—primarilly on the base housing, off; which from time to time gives me a general indication of what rentals are doing in the community; I have stated that anything I have in that line must be general, but I do get that information from time to time.

Q. Are you prepared to say there what the units would—you have just given the average rental of the units at Offutt as being $71.04; is that the highest? is there a variation in the units?

A. Yes, there is.

Q. What is the highest rental that is received?

A. As I recall it $89.00; however, I have a schedule with me which I could give you exactly; but $89.00, as I recall it, is the highest.

Mr. Reed: Eighty-five. I don't want to correct you. Net rental. That is the Base figure.

A. Well, as I say, as well as I remember.

By Mr. Entenman:

Q. And what is the lowest?

A. I think it was about $51.00. About that.

Mr. Reed: If I may, for accuracy, fifty-three, I think.

A. OK. I only missed it four.

By Mr. Entenman:

Q. Now, what is the difference in the accom-odations of those two?

A. Well, there are two differences, Mr. Entenman; one is the difference in size; and two is, there is a difference in whether the quarters are occupied by airmen or officers. [fol. 134] Q. Does the location make some difference there? That is, if the entire unit is officer personnel, or something, there? Is it——

A. Only insofar as there is a general division of this end of the project is occupied by officers; the other end is occupied by enlisted personnel.

Q. And what proportion of the 611 units would you say is reserved for officers?

A. Three hundred.

Q. Three hundred?

A. Yes.

Q. And the other 311 for enlisted personnel?

A. That is correct.

Q. Now, does the—in the military pay is there any provision for reimbursement for rent or rental allowance, or any consideration paid by the Federal Government for the rental for the airmen in these units?

A. There is a rental allowance, yes sir.

Q. And is that the same whether they are in Wherry, or whether they are living in Papillion, or Bellevue, or Omaha?

A. Yes, it is.

Q. That is the same?

A. Yes sir.

Q. Do you know what the rental allowance would be for the enlisted personnel? say the private, or private first [fol. 135] class, or airman first class?

A. Well, it varies, Mr. Entenman; based on, one, the grade of the airman; and two, a factor of the number of dependents, the number of children he has; and offhand I don't remember just exactly what the figures are.

Q. Well, could you, Col. Beck, give us the lowest figure that would be possible there if it was an airman with just his wife, and, we will say, not much service; or the lowest rate?

A. I don't remember that figure right at this moment, gentlemen; it's obviously available from the Base, from any one of the military documents—pay documents, pay register.

Q. And do you know what the highest would be?

A. Well, mine, in the case of my home, it is $136.00.

Q. $136.00?

A. Yes.

Q. And that would be——

A. That's a colonel.

Q. A full colonel?

A. Yes.

Q. And does that make any difference whether there is just the wife and one or two children?

A. It doesn't matter; just so you are married.

Q. Is that true of all officers, then?

A. Yes. The number of dependents wouldn't matter in case of officers; it does in case of airmen.

[fol. 136] Q. But the amount of rental allowance for officers does vary with grade?

A. Yes; very markedly.

Q. What would the lieutenant be then? or the lowest in the ranks?

A. I don't remember what it is. Again, it would be available in the register.

Q. On Offutt Air Force Base there are also quarters owned and maintained, and served, and belonging to the Federal Government; is that correct?

A. Yes sir.

Q. And they are occupied by both officers and enlisted men too; is that correct?

A. Yes sir.

Q. Now, Col. Beck, do the officers or enlisted men occupying those quarters proper, on the base; do they receive a rental allowance?

A. They receive—They are entitled to a rental allowance; but they pay it back before they get it. They don't actually receive it in their pay check.

Q. Do they receive any of it?

A. No. They forfeit the rental allowance by taking the quarters.

Q. Now, on direct examination you stated that you were familiar with the acquisition of the land by the United States Government.

A. Yes.

[fol. 137] Q. Particularly this tract from the Omaha Chamber of Commerce; was there any consideration paid for that?

A. By the United States Goverment?

Q. Yes.

A. No.

Q. Would it have been possible for the United States Government to condemn and acquire this property?

A. Yes.

. . . . . .

Q. Have you any explanation why this property was given to the government instead of acquired and paid for? Does that have anything to do with the securing of this housing? that you know of.

A. I think I could explain it. When SAC first came to Omaha Omaha made certain promises to the Air Force. One of those promises, and a very major one, was that there would be adequate housing for the personnel of the Strategic Air Command; and, frankly, Omaha didn't make good on its promise. The Chamber of Commerce, needled, perhaps, a little bit by General Le May, came through with this land, made it available, as I have stated earlier, for the construction of housing, and at the time the first negotiations for obtaining this property were started Wherry [fol. 138] Housing—as far as I know the Wherry-Spence Act had not even been passed, if my memory serves me right; I definitely know at that time the SAC Housing Association, which I was very closely associated with, sometimes known as the Blue Sky Housing Corporation in jest, we also needed some place to build some houses, that's the one we were going to build by our own efforts; and that, to the best of my knowledge and recollection, is the way this grant came about; it was a bona fide gift on the part of the Chamber of Commerce in part, at least, fulfilling its obligation and promise to the Air Force when SAC first came here.

Q. Did they show you any sites in Douglas County, or the City of Ohama?

. . . . . .

A. I don't know, Mr. Entenman, if they showed any to anyone, I have no way of knowing whether they did or not. They didn't show me any.

Q. Now, you stated on direct examination that at the time the property was acquired from the Omaha Chamber of Commerce that there had been no discussion with the Offutt

Housing Company, or organized, or with Carl Wilson; is that correct?

A. As far as I know that is correct. I don't believe that Offutt Housing Company was organized at that time.

. . . . . .

[fol. 139] By Mr. Entenman:

Q. Col. Beck, in your direct examination in stating that the housing difficulty was one of the reasons why it was difficult to get the airmen to re-enlist. If they don't re-enlist where do they live? Where do they go?

A. I wouldn't have any way of knowing. I suppose some of them go home, some of them go some place else; I don't know where they go.

Q. And some of them might stay right in the same area, might they not?

A. Your guess would be as good as mine, Mr. Entenman; I don't know where they go.

Q. Well, how do you mean there that there would be better housing conditions outside than there would in the Army? How would the housing conditions be better? How would that effect the going to another company? I believe you said that "other companies" this morning, gave you quite a bit of competition after you trained the men in radar. Didn't you state that this morning?

A. Yes, I certainly did.

Q. All right, if they are going to take positions with other companies, where are they going to live? How do you tie that up with the housing problem.

[fols. 140-141] A. Well, I think you tie it up on the basis of income rather than the house; you know, if you have enough money you can live in a castle.

Q. Well, is the income better now outside?

A. Oh, very definitely it's better outside.

Q. That is your opinion of it.

A. Well, it depends on the individual who's going to get hired, you know, as to whether he gets more or less money; but these highly skilled technicians, their pay outside is greater than it is inside, yes sir.

Q. Well, that might be the difficulty with the Army in getting them to re-enlist, rather than the housing?

A. That's quite true, but housing is really in effect a part of the pay.

Q. Col. Beck, has the Federal Government paid one dime to the Offutt Housing, the Treasury of the United States——.

. . . . . .

A. I wouldn't know that.

. . . . . .

[fol. 142] Redirect examination.

By Mr. Charles S. Reed:

Q. Is Offutt Air Force Base in any school district?

A. It is not, Sir.

Q. Is any of the Wherry Housing involved in any area in which this Tumpane Company has any connection?

A. No sir; has no connection with Tumpane Company whatsoever.

Q. Now, in connection with the cross-examination the term of—average term they stayed at Offutt Air Force Base; I want to ask you if you have similar housing at other Air Force Bases to which your personnel might be transferred from Offutt Air Force Base?

A. They do have Wherry Housing at other Air Force Bases.

Q. Quite generally?

A. Quite a number of them, yes sir.

Q. Now one more question: Mr. Entenman asked you if the Omaha Chamber of Commerce showed you, and others showed you, a site in Douglas County that might be used for rental housing. Do you remember, Col. Beck, that this James tract is the tract that General Le May said that he wanted?

A. Yes sir; very definitely do remember it.

Q. In other words, the site for this housing which was acquired and donated to him by the Chamber of Commerce, it was General Le May that picked the site, wasn't it?

A. Yes sir. It so happens that it is the only site suitable for housing that is contiguous to—or was contiguous to the limits, the boundaries of Offutt Air Force Base.

[fol. 143-144] Q. What I am getting at is there wasn't any—the place that was bought and donated to the United States for housing wasn't a site selected by the donor, was it? it was one selected by General Le May, and asked them to do that, to facilitate housing, is that correct?

A. That is correct.

Q. And General Le May is the commanding officer of the Strategic Air Command, is he not?

A. Yes sir.

Q. And the headquarters of the Strategic Air Command is located on Offutt Air Force Base?

A. Yes sir.

Q. Offutt Air Force Base has a separate base command, doesn't it?

A. Yes sir.

Q. For handling of the base, and base improvements, it comes under the Offutt Air Force Base Command rather than directly under SAC; isn't that a fact?

A. Yes sir.

. . . . . .

[fol. 145] Redirect examination.

By Mr. Charles S. Reed:

Q. Col. Beck, do your know the reason why the percentage allocation between airmen—which we used to call enlisted men in military parlance—and officers—why the percentage of housing units was allotted as it was between those two classifications?

A. Yes sir. The percentage of officers occupying Wherry Housing in this particular project is unusually high. There are two reasons. One is that we have more officers at Offutt Air Force Base than a normal base would have due to the presence of the headquarters of the Strategic Air Command; but another and more compelling reason is the fact that the officers in effect are subsidizing the rents for the airmen, I suppose we can call this a little form of socialism in a way, in that the officer is receiving a higher rental allowance, or in effect paying more money for the same type of an accommodation that an airman pays considerably less for.

Q. In this Wherry Housing at Offutt Air Force Base?
A. Yes sir.
Q. And then you have, therefore, raised the percentage of officers to in turn reduce the rental to the airmen at the Wherry Housing at Offutt Air Force Base?
[fol. 146] A. Yes sir, that is exactly what happens.

* * * * * * *

Recross-examination.

By Mr. Orville Entenman:

Q. Do you mean that the officer that would receive $135.00 rental allowance pays that much rental?
A. No, he doesn't pay that much; but there is very little difference between a three bedroom Wherry unit that an officer occupies and a three-bedroom *unit* Wherry unit that an airman occupies, but the officer will pay considerably more for a unit than the airman pays. It is in effect a subsidy.

* * * * * * *

HERBERT S. WEISFIELD, called as a witness on behalf of the plaintiff, being upon his oath first duly sworn, testified as follows:

Direct examination.

By Mr. Charles S. Reed:

Q. Please state your name.
A. Herbert S. Weisfield. Do you want my address?
Q. Yes.
A. Alexandria, Virginia.
Q. What is your business?
A. I am legal advisor in the Family Housing Group, Di-
[fol. 147] rector of Installations, Department of the Air Force. We also act for the Secretary of the Air Force in connection with family housing, with headquarters in Washington, D. C.

Q. Does your department include what is commonly referred to as Wherry Housing?

A. Yes sir.

* * * * * * *

Q. Who was the officer who set up the mechanics of Wherry Housing so far as the Air Force is concerned?

A. The Secretary of the Air Force's office established the family housing group. Is that what you mean.

Q. Yes, but I have in mind wasn't it a Col. Elliott who set up the mechanics as far as the Air Force is concerned?

A. Well, he was one of the originators of setting up the procedure; prior to him there was another colonel.

Q. But you were in Col. Elliott's office, were you not?

A. Yes sir.

Q. While he was there.

A. Yes sir.

Q. I will ask you—You heard Col. Beck testify, didn't you?

A. Yes sir, I did.

Q. Will you tell the mechanics of the evolution of Wherry housing, trying, if you can, to eliminate duplication of [fol. 148] what Col. Beck testified?

A. Well, first of all let me say this; that taking the project after it has been transmitted by the particular base that is interested in obtaining Wherry Housing, with their proposals and their recommendations; then our office is set up to make a determination as to whether—as to the number of units that are required for a particular base; we take that proposal and we examine it very closely, what we call the qualifications, the standards that we think it should for the military personnel who are going to reside on it; and on the basis of that we then determine what the fair rental should be for those units, and we then issue a certificate——

Q. Well, I want to ask you, before you get into the certificate, do you take into consideration the ability of the base personnel to pay in fixing your maximum rentals?

A. Yes sir, we do.

Q. All right, go ahead, Sir.

A. Well, after the sponsor has been selected, and we have certified that there is a need for the housing, we turn the

certificate over to the sponsor; he then can take it to the FHA, requesting a committment to insure, and after certain qualifications that FHA requires, as to whether he has sufficient construction money, whether he can borrow enough money, as to whether he meets all the requirements, they will then issue such committment, and attached to this committment will be a project analysis which sets out the rents, [fol. 149] and the rents are the same as they appear in the certificate that we have issued to the sponsor.

Q. But if the rentals in the sponsor's proposal exceeds the Secretary of Air's declaration of maximum, then the project does not go forward?

A. That is correct.

Q. Will you continue.

A. Then after the committment has been issued to—Well, let me add this: When we issue the certificate we also in those cases we issue what we call a letter of acceptability, and under that we give the sponsor a certain amount of time in which to get the project in order and get it under construction, that is, to get his loan, his mortgage, his title searched, and various things needed to close it.

Q. I wish to interrupt you again. You assume that we know the pre-requisites of this certificate. In Air Force Housing what must be determined by the Secretary of Air before a sponsor can officially contact FHA?

A. We must have it declared a permanent—it must be a permanenent installation must be considered that it is going to be used permanently, a part of the national defense, must be determined the housing is actually needed there, and we usually when we determine that we don't program the maximum amount of housing, because we don't want to have too much housing in a particular area, as a maximum we allow seventy-five percent of what the requirements are. Is that [fols. 150-151] what you had in mind, Mr. Reed?

Q. Well, I am just trying to elicit the fact; yes, that was what I had in mind on that. What is the jurisdiction of the Air Force as to the rentals that may be charged by a selected sponsor in the instance where the project is covered by a mortgage insured by the Federal Housing Administration?

[fol. 152] A. The Air Force establishes the rent for the project at its inception, which has to be approved by FHA.

By Mr. Reed:

Q. Now, let me take this lease here, this paragraph that Mr. Entenman was inquiring about.

Mr. Entenman: Paragraph four.

By Mr. Reed:

Q. I want you to refer to paragraph four of Exhibit 4.

A. Yes.

Q. Do you know who prepared the phraseology of that paragraph? Just answer yes or no.

A. Yes.

Q. All right, who prepared it?

A. That's prepared in our legal section in our office.

Q. All right. Now, Mr. Weisfield, explain, not as a conclusion of ultimate conclusion in this case, but explain the reason for the inclusion of that paragraph in a lease pertaining to Wherry Housing.

A. This paragraph is to operate after the insured mortgage has been paid off by the sponsor of the housing corporation.

. . . . . .

Q. I wish you would refer to section eight. In that [fols. 153-54] phraseology in there there is a sentence starting, "In the event any tax assessments or similar charges," and so forth. Do you find it?

A. Yes sir, I do.

Q. Now, I will have to ask you again, I think: Who prepared the language of the part that I am asking about?

A. Our office. Let me preface that by saying that this is a standardized form of lease that we have established for all the Wherry Housing projects for all the bases throughout the country.

Q. Well, that will fall in my next question. Now, state the reason for the inclusion in there of the sentence which starts, "In the event any taxes, assessments or similar charges are imposed with the consent of Congress."

A. That section was put in there for one purpose; that in the event Congress would consent to the taxation of Government owned improvements, and that exclusive jurisdiction—say that the United States retained a reservation by the states of a power to tax, that if they had a taxing statute, they then could reach such interest.

. . . . . .

[fol. 155] A. This paragraph was put there to protect any sponsor of a housing project in the event exclusive jurisdiction is ceded with that limitation on it, that the state reserves the power to tax, that in the event there is such a tax placed upon the project that we can re-negotiate the lease and allow increase for those taxes.

By Mr. Reed:

Q. Are you an attorney too Mr. Weisfield?

A. Yes sir.

Q. Are you familiar with the United States statutes that have to do with the taxing jurisdiction of the United States in cases of property on Government owned reservations? Are you familiar with the United States statutes?

A. Yes, I am, Sir.

Q. Do you know of any existing, or is there any existing, Act of Congress which in the instance of ceding of exclusive jurisdiction by the state upon the acquisition of additional Government real estate, re-cedes jurisdiction to the state to tax a Wherry Housing project?

[fol. 156] A. No sir, I do not.

Mr. Entenman. Just a minute: I object to that as calling for a conclusion of the witness. If we have a question of state statutes or Federal Acts it is a matter of law in this case, and not for some opinion to be put into the evidence.

By the Court: Overruled. I will let the answer stand.

. . . . . .

By Mr. Reed:

Q. All right. As I understand it the work that you are engaged in is work that has to do with, including the

securing of military housing through Public Law 211, [fol. 157] commonly known as the Wherry Act?

A. That's right.

Q. Now, what other steps were taken to bring Wherry Housing into being on a Government military reservation in addition to those you have related?

A. Well, after it reaches the commitment stage, then we are interested in getting the construction started on the project; so we try to expedite this matter by setting out certain terms and conditions which the sponsor must meet within a specified term in which to complete the project—or to start the construction, rather, or we will cancel the certificate; we usually give them sixty or ninety days; that means he must have a title search made of the property, he must get his construction loan, he must also get his permanent mortgagee, providing this because the construction lender will not take a permanent mortgage, it's usually taken by a savings bank or insurance bank; and then he must also prepare the lease in accordance with a form we submit to him, and that lease is sent back to our office for examination, and it must also be in a form we have suggested, and then he must send that in executed; then we will then submit it to the Secretary of the Air Force for his signature, either by him or his representative. And when all those have been taken care of, the mortgage has been secured, the money, and all such, then we have what is known as a closing; the closing usually takes place in the Federal Housing Administration office, in which the project [fol. 158] is located, and at that time the papers are passed, a mortgage is given to the lender, FHA then insures it, and all of the papers are put on record; then he's given authority to go ahead and construct the project.

Q. Now, the selected sponsor, isn't it requ-red that he, that the selected sponsor form a special corporation for any particular Wherry project, a new corporation?

A. Yes, that is set out by the regulations of the Federal Housing Administration.

Q. They also will be in evidence. And are there not model forms of the formation of the corporation for the sole purpose of furnishing such defense housing?

A. Yes sir; I believe that is correct.

* * * * * * *

Cross-examination.

By Mr. Orville Entenman:

Q. Well, now, Mr. Weisfield, is it correct then that all the steps that you have given are provided by the Wherry Housing Act, aren't they; particularly the certificate that it is a permanent base and housing is needed?

A. Yes sir.

Q. Aren't those the provisions of the Wherry Housing Act?

A. Yes sir, that is correct.

Q. Then too, isn't it part of the steps that you have stated here were required by the FHA Housing Admin-
[fol. 159] istration before they will insure a loan of this type?

A. It's required by the Act, and of course the condition precedent to considering a housing project of this type is a certificate from the Secretary of the Air Force, with those three conditions are set out.

. . . . . .

Q. Is there some discretion in his determining whether or not the loan will be approved? He has to approve the loan, don't he?

A. Yes sir, that is right.

Q. Or approve the procedure.

A. That is right.

Q. Well now, the fact then that the question of compliance, that is, the amount of revenue or income coming in here, isn't that to satisfy the FHA, rather than anyone else?

A. Not entirely true; it is also to satisfy the Department of the Air Force.

Q. Well, in what way would they be obligated here?

A. Insofar as the rental is concerned, the amount of rental being paid, that we get the type of housing needed for our military personnel, and that rental shall not exceed, shall not be too large a burden and beyond their ability to pay.

Q. Well, FHA is interested in their ability to pay, isn't it?
[fol. 160] A. That is right.

Q. Well then, do you have the power to cancel this certificate?

A. Yes sir, we do.

Q. Under what authority? Where do you obtain that power?

A. Under the regulations; under our regulations that we have established.

Q. How about under the lease?

A. There is no lease given until after he has completed all the pre-requisites that I discussed before. In other words, a lease is the last thing that we give; he doesn't get the lease until the day he's ready to start construction, and that we are sure that the Federal Housing Commissioner will insure the mortgage.

Q. Well, there are provisions in the lease to terminate it even if you would grant the lease before, aren't there?

A. That is right; but in our mechanics, the way we operate, we don't give it before.

Q. Now, you stated that this tax clause is contained in here, that if there were to be taxes paid by the lessee, that is for his protection. What did you mean, "for his protection"?

A. Well, in other words, in any of our projects, and Offutt of course is one, no taxes were estimated for the project in determining the amount of rental that shall be paid by the tenant.

Q. Well, you mean there no tax is paid by the Federal Government, don't you?

[fol. 161] A. That one part there, yes sir; that no tax is paid by the Federal Government.

Q. And isn't that what you are referring to in your testimony?

A. Yes; but in the first part of paragraph eight, "the lessee shall pay to the proper authority when as the same become due and payable all taxes, assessments or similar charges which may at any time during the term of this lease may be taxed, assessed or imposed upon the Government or upon the lessee with respect to or upon the leased property." Now, that first part does talk about interests of the lessee in a housing project; but, again, there we put that in there for one specific purpose, as I pointed out before, this is a standard form of lease that we use in all

jurisdictions, that we do have some jurisdictions where the state has reserved the power to tax when they ceded exclusive jurisdiction; in those instances we recognize that there may be a tax, if there is a tax in a state that could reach such an interest.

Q. Well, read the rest of the——

A. Well, then the last is, "in the event," and talking about that, any taxes, assessments; that is where Congress would pass an act permitting the taxing of Government owned property as distinguished from privately owned property.

Q. And it states that right in there, isn't that right?

A. That's right, but there is no statute on the books allowing the taxing of Government owned property; Con-
[fol. 162] gress has not consented to that.

Q. All right, now turn to paragraph eleven of that.

A. Yes sir. I am quite familiar with paragraph eleven.

* * * * * * *

Q. Mr. Weisfield, does the lease, Exhibit 4, referred to here, make provisions for the setting of the rentals for the tenants, airmen or whoever else occupies these units?

A. Yes, on the first page of the lease.

Q. On what page?

A. First page. Shall I read it?

Q. Yes.

A. Come down here to, "hereby leases to the lessee for a period of seventy-five years commencing on the date of final execution of this lease by the Government and by the
[fol. 163] lessee, subject to termination as hereinafter provided, the land as hereinafter described, to be used for the purpose of erecting, maintaining and operating a housing project, consisting of approximately 611 units, substantially in accordance with the outline plans and specifications submitted to the Department of the Air Force and in accordance with the detailed plans and specifications to be approved by the Federal Housing Commissioner (hereinafter referred to as the Commissioner).

Q. Do you mean, then, that in accordance with the outlined plans and specifications?

A. Yes, he shows us in there when he submits this pro-

posal, it contains all that information in connection with the plans and specifications.

Q. Well, then, what is the paragraph four?

A. Well, that paragraph provides, I believe it's thirty-five years period over which the mortgage is paid off by the sponsor of the housing project. Now, when we reach that stage we have to have some arrangement as to the adjustment of the rent; that is when paragraph four comes into being; because we couldn't have any mortgage under 211 unless it is an insured mortgage, there would be no project; that takes care of the contingency of when the mortgage has been paid off.

Q. Then you state that the consideration that the Offutt Housing Company, the plaintiff in this case, receives is dependent upon the plans and specifications referred to in [fol. 164] page one of the lease?

A. You mean as to the amount of rent being charged?

Q. Yes; for the tenants, now, of Offutt Housing.

A. That is on the certificate; and he must fill—in other words, when he has submitted his proposals, with his plans and specifications, then when the rent has been determined he must do it in accordance with that, and also his commitment; the commitment to insure contains that schedule, and that can't be changed.

Q. That can't be changed?

A. Unless under certain circumstances that would show.

Q. Are those included in this lease? any of those certain circumstances? I am not talking about if the Commissioner takes over; I am talking as long as this plaintiff is in possession and operated under this lease; there is no way of changing the rents or the amount of rental he will receive?

A. I am not saying that. No, that's not true. Economic conditions may change in connection with operation and maintai-ance.

Q. Yes.

A. Yes; may require additional funds in order to be able to take care of that additional overhead; and under approval of the Air Force and FHA, he may get an increase in rental. That is correct.

Q. Well now, that doesn't state in this lease, does it?

A. No sir, but that's part of——

Q. There is nothing about it in this lease, though, is there?

[fol. 165] A. That's his contract with the FHA; the commitment to insure.

Q. Which is outside the lease, then?

A. That's right.

Q. Do you have those plans and specifications available, in this particular instance?

A. I believe that they will be available in the FHA office; I believe they will have some.

Q. They would be?

A. I believe so.

Q. How long has this form of lease been used?

A. Well, I would be guessing on this form of lease. This lease, say, about three years. Now, that is roughly.

Q. Now, you know that there is a housing project known as the Moses Lake Project?

A. Yes sir, I do.

Q. At Washington.

A. Yes sir.

Q. Was there a different form of lease used in that case? Do you know whether there was a different form? or was that the same standard form?

• • • • • • • •

[fol. 166] A. That form, the original form of lease for Moses Lake, Washington, Air Force Base, was slightly different; but was modified later.

By Mr. Entenman:

Q. What modification was made? do you recall?

A. Clarified paragraph eleven.

Q. And in what way was it clarified?

A. To show the true intent of the parties, that the property belonged to the United States, for the express purpose of just carrying out the operation of law; that is all.

Q. Now, through your advising the Secretary of the Air, do you know whether or not Federal funds of any kind have been applied or used in this—acquiring of this housing for military personnel?

• • • • • • •

[fol. 167] A. No sir, I do not know.

* * * * * * *

Q. Well, what security, then, was given to the FHA for the loan of money, or to the mortgagee?

* * * * * * *

A. The leas-hold interest in the property.

* * * * * * *

Redirect examination.

By Mr. Charles S. Reed:

Q. You were asked about the authority to make a change in the event of taxability, on cross-examination, over my objection, and you testified that that was not in the lease itself, the changing of the rental in the event; I am going to ask you if there isn't something in the Act itself that is authority for the modification in the event?

A. I would have to refresh my memory on that.

Q. Well, I will ask you—and I want you to look—that's [fol. 168] the reference I made to, to 1748b-1 there, and the next sub-paragraph, the sub-paragraph two.

A. Yes, it does provide for the adjustment of rents.

Q. Now, your answer, does it not, refers to Section 1748, little "b", (b), and then (1 and 2), of the 1952 Cumulative Supplement to Title 12, USCA. Is that right?

A. That's right.

Q. Reference was made in a question too, was used, that FHA approves the loan. Does FHA loan any money, or approve a loan? Isn't it a fact that what is involved is decision of FHA whether to insure a loan?

A. That is correct.

Q. Instead of approving a loan. Now, the amount paid by the sponsor here is nominal under that lease here. I think you are familiar with that.

A. That's right.

Q. Is that customary in such lease?

A. Yes sir, and also provided by Public Law 211 that we could make the land available at a nominal consideration.

Q. And what is the reason for that?
A. To keep the rents down.

. . . . . .

Recross-examination.

By Mr. Orville Entenman:

Q. And doesn't that, then, remove the property from the [fol. 169] Federal jurisdiction? when the Act of Congress said they could lease it and rent it to a private concern for housing?
A. No sir.

. . . . . .

Q. Well, anyway the Wherry Housing Act does give the Secretary of the Air Force, the Army and the other bra-ches, the right to rent and lease this property; doesn't it?
A. That's right.
Q. Even sell it; doesn't it?
A. No, I don't believe there is anything in 211 that provides for the sale of it.

. . . . . .

Q. Now as to the real estate involved in itself, as to being [fol. 170] used for this housing; this act provided for the first time that the Secretary could transfer the interest, and as a matter of fact it was of such nature that it is non-cancellable, the lease; isn't it?
A. Well, the purpose of that was so it would be good security for the loan.
Q. Yes; and to be good security wouldn't it have to be subject to sale?
A. The whole interest could be sold, yes; but nothing else could be sold.
Q. Whenever the secretary of the Army, Navy or Air determines it to be for the best interest of national defense he is hereby authorized to sell, transfer and convey at fair value, as determined by him, for use under this title, any right, title and interest in real property under his jurisdiction.

A. We have never exercised such right.

Q. Yes, but you have it, don't you?

A. No question; but I am not too familiar with that right.

Q. And as a matter of fact isn't that right exercised here under the lease you have with Offutt Housing?

A. Yes sir, we exercise under the first part of that section. Here's what we exercise, "Whenever the secretary of the Army, Navy or Air Force determines that it is desireable to lease such property within the meaning of the Act of August the 5th, 1947, to effectuate the purposes of this Title, the [fol. 171] secretary concerned is authorized to lease such property, under the authority of said Act, on such terms and conditions as in his opinion will best serve the national interests without regard to the limitations imposed by said Act in respect to the terms, of the duration of the lease, and the power vested in the secretary of the department concerned to revoke any lease made pursuant to said Act in the event of a national emergency declared by the President shall not apply." There is where we exercise our right.

Q. And that is under the authority that is referred to there?

A. That's right.

Q. And, now, from your opinions and operations you have with that, then, do you say now that the Federal Government, the Government of the United States, has exclusive jurisdiction over the property that was leased to Offutt Housing?

A. Yes sir.

Q. Exclusive?

A. Yes sir.

Q. The lease means nothing?

A. No, you are talking about exclusive jurisdiction; you mean that jurisdiction that has been ceded by the State of Nebraska to the United States Government?

Q. Yes.

A. Yes, we have that; as a matter of fact, there has been no retrocession of jurisdiction.

[fol. 172] Q. You have the same right? you could kick Offutt Housing off of there tomorrow, could you?

A. No, we cannot kick them off, I am not saying that; but as far as jurisdiction, police power, and all that——

Q. I am talking about the interest in this real estate.
A. We have use and occupancy of that, for——
Q. Well, doesn't Offutt Housing, the plaintiff herein, have that?
A. We have the use and occupancy of that, first.
Q. Use and occupancy.
A. That's right.
Q. For a period of how long?
A. Seventy-five years.
Q. And for the sum of what?
A. For one hundred dollars a year.

* * * * * * * *

Redirect examination.

By Mr. Charles S. Reed:

* * * * * * * *

[fol. 173] Mr. Weisfield, I think that on cross-examination you were asked whether there is any Congressional authority—or that you testified that there is no Congressional authority for taxing Government owned property on the Wherry Housing tract. Is that your recollection?
A. Yes sir.
Q. Now, I would like to ask you whether there is any Congressional authority for receding of jurisdiction to the state, receded jurisdiction to the State of Nebraska and its political subdivisions, of authority to tax any interest in the Wherry Housing at Offutt Air Force Base?
A. There is not.

* * * * * * * *

Recross-examination.

By Mr. Orville Entenman:

Q. Mr. Weisfield, doesn't the Wherry Housing Act provide that if the property were to become the property of the Commissioner of the FHA, that then the property would be subject to taxation?
A. No sir, it does not.

*

Q. What does it state, that section?
A. Would you give me that section?

. . . . . .

By Mr. Entenman:

Q. Section 808; if you will read Section 808.
[fol. 174] A. No, there is nothing in Section 808.
Q. 807; I am sorry; the one above.
A. Yes, I am familiar with Section 807.
Q. Doesn't that provide that if the property would become the Commissioner's that it would be subject to local and——
A. No sir, it does not.
Q. Well, what does that mean?
A. Well, that explains to you. Section 807 appears in all titles of the National Act, as well as in this Military Insurance Act. Now, the purpose of that is in the event that the —let's take for an example Wherry Housing, in the event there was a default by the sponsor of the project, and the mortgagee instead of foreclosing on his mortgage decided to take his insurance from the FHA, he would then transfer the mortgage to FHA, who would then foreclose on the mortgage, and in this particular instance, at Offutt, assuming it happened at Offutt, it would be a foreclosure on a leasehold interest, and all this section of the Act provides is that in the event that the leasehold interest was subject to a tax, the mere fact that FHA had taken over the project would not exempt it from taxation; but it doesn't say that the property is taxable.
Q. Well, then, aren't you saying just the converse of what that states; that the Act of Congress provided that if the Commissioner held the property it would be subject to taxation?
A. It does not provide that by the very fact that he would [fol. 175] come into possession that it would be subject to a tax; nor does it provide that it would be exempt from taxation if a legally constituted tax was placed on the leasehold interest.
Q. In other words, Congress didn't exempt this property if it became the FHA property, or the Commissioner's?
A. No sir, that isn't what it says.

Q. I believe that is what I stated here; that nothing would be construed by the Act to exempt the property if it became the property of the Commissioner.

A. Let me put it to you this way, Sir: Assuming we had a case where jurisdiction was ceded by the state to the Federal Government, reserving to that state the power to tax, and in addition that state had a statute which could reach a leasehold interest; under that reservation of power they then could assess and levy a tax on that leasehold interest in a Wherry Housing project; and that is to protect the taxing authorities in the event the FHA would take over the project, but the mere fact that the project was taken over by FHA would not exempt it from taxes, taxes still could be levied.

Q. That is right. It does not exempt it, then, even though it would—and if it became the Commissioner's property, then the entire interest would belong to the Federal Government, would it not?

A. No sir; only the leasehold interest.

Q. Well, you are claiming now that fee title here is in the [fol. 176] Federal Government.

A. The fee title is in the United States of America, under the Department of Defense.

Q. Then what's FHA under? The Commissioner of——

A. There's a severance of use of property and title to land; all title vests in the United States of America. Now, when the FHA Commissioner takes over, all he takes over, he's stepping into the shoes of the mortgagee.

Q. Well, he is a United States Governmental agency, though.

A. That's right.

Q. Now, you stated just a minute ago that if the states reserved the right to tax the property in which they had ceded jurisdiction, are there any states which do that?

A. Yes, there are some states that have reserved the power to——

Q. Do you recall any?

A. California has that type of a cession statute; and I believe Texas now has that type of a cession statute.

* * * * * * *

[fol. 177] By Mr. Entenman:

Q. Now, did you state that in relation to Wherry Housing Act this is the only authority that Congress has granted in relation to taxes? Is that correct? in relation to the Wherry Housing.

A. No, I haven't said that.

Q. No; you said here that they have made no provision for taxing the Wherry Housing project; isn't that the sum and substance of your testimony here?

A. Yes sir.

Q. All right. Now, is that true of all Government projects? has the Government provided for specific exemption of this rule that the Federal Government could not be taxed—property of the Federal Government could not be taxed? There are other instances, are there not? particularly of the defense corporations during the war.

A. Yes, that is by specific statute that specifically provided that even though title be in the RFC or the defense plant corporation, why, it would still be subject to tax.

Q. And how did that differ from the clause that we just read in this Act?

A. Well, now, what you have to keep in mind in this particular Act, you have got to think of the National Hous-
[fol. 178] ing Act as a whole; and ordinarily most of the housing projects which are insured by FHA are owned in fee by the sponsor of the project; this is the only one, Title 8, in which you have the use of the leasehold interest, when a project is constructed on the base; yet, this particular section is not peculiar to Title 8, as I pointed out before.

* * * * * * *

By Mr. Entenman:

Q. Are there Wherry Housing projects, or housing projects under the particular section of housing act known as the Wherry Act that are not in property owned by the United States Government?

A. Yes.

Q. There are?

A. Yes.

[fol. 179] Q. Now, are those projects subject to taxation, local taxation?

A. Yes sir, because they are not under the jurisdiction of the United States.

Q. Now, if those were to be foreclosed, and title in the Commissioner of FHA, would they still be subject to taxation?

A. Yes sir; that's the purpose of that section; in other words, to protect the state; the very fact that FHA took over the interest of the mortgagor, it still would be taxable; that's correct.

Q. Do the leases that provide that this property, or the housing built on private property, becomes the property of the United States Government?

A. There are no leases.

Q. Or the contract, then. There has to be a contract with the secretary of—and FHA.

A. Well, now, there may be some arrangements between FHA and the sponsor, but they are not using any of our property, so we don't make them any lease.

Q. And there the Secretary of the Air has no control whatever over the rentals?

A. Yes sir, we have the same control over them as the others.

Q. But the buildings, the improvements do not become the property of the United States in those cases?

A. No sir.

. . . . . .

[fol. 180] RALPH C. MASON, called as a witness on behalf of the plaintiff, being upon his oath first duly sworn, testified as follows:

Direct examination.

By Mr. Charles S. Reed:

Q. Mr. Mason, please give your name and business, please.

A. Ralph C. Mason, Assistant State Director, Federal Housing Administration, Omaha, Nebraska.

Q. How long have you occupied that position?

A. About ten years.

(Plaintiff's Exhibit 12 marked for identification by the reporter.)

Q. Mr. Mason, I am handing you Exhibit 12, and ask you to tell the Court what that is.

A. These are the administrative rules and regulations for the insurance of mortgages under Title 8 of the National Housing Act known as military housing insurance.

Q. And otherwise known as the Wherry Act?

A. Yes, that is correct.

Q. And is there attached to those rules all of the supplementary rules or the amendatory rules pertaining to Title 8 of the National Housing Act?

A. Yes, it contains all of the amendments to the rules and regulations up to the present time.

[fol. 181] Mr. Reed: Plaintiff offers in evidence Exhibit 12.

. . . . . .

By the Court: It will be received to the extent that they are applicable to this controversy.

. . . . . .

Q. Were you active in the FHA processing of this Wherry [fol. 182] Housing Project at Offutt Air Force Base?

A. Yes, I was.

Q. Did you hear the testimony of Col. Beck and Mr. Weisfield about how these projects came into being?

A. Yes, I did.

Q. Now, was anything omitted there, in the creation of these projects, up to the time it reaches your office for processing? that you think of.

A. No, I don't believe so. I think it was pretty well covered.

Q. Now, how do one of these military housing projects known as Wherry Housing officially get to FHA? I mean by that all the way through my questioning Federal Housing Administration.

A. The Secretary of the Army installation involved certifies the project to the Federal Housing Administration office having jurisdiction, and in the certification of course they state the amount of housing units that are needed, the

average maximum rent that the military personnel are able to pay, and——

Q. I will interrupt and hand you Plaintiff's Exhibit 3, and ask you if that is the certificate that you refer to, that starts the official attention of the FHA in these projects?

A. That is right. The sponsor must present this certification along with his application for mortgage insurance; and until this is received we cannot act on the application.

Q. Now, is this term "sponsor" an official term? Is that official terminology under the Wherry Act and the regula-
[fol. 183] tions pertaining thereto?

* * * * * * *

A. A sponsor is generally identified as some one individual or group of individuals who propose to construct the housing. They differ from the mortgagor in this respect; usually a corporation is created as the borrower and the holder of the interest in the real estate, and until such time as we have completed the processing of an application our dealings involve the sponsor rather than the proposed mortgagor, who generally is a corporation.

Q. What I am asking is does the term "sponsor" have a definite concept in the Federal Housing Administration as pertaining to Wherry Housing?

A. Yes, I would say that it's the individual or group of individuals proposing to construct the project, or being certified by the installation as being selected to put the project together.

Q. And is the party which presents this certificate, "Need for Military Housing", officially referred to by the FHA thereafter as the sponsor?

[fol. 184] A. Yes.

Q. Now, during the processing—is that the correct term? —by FHA——

A. Processing or examination of the application for mortgage insurance.

Q. —does the Federal Housing Administration make an analysis of the proposed military housing project?

A. Yes, we do.

Q. And is that known as a Project Analysis?

A. The Project Analysis summarizes our findings

throughout the examination of the proposed mortgage loan transaction.

. . . . . .

[fol. 185] By Mr. Reed:

Q. All right. I am handing you Exhibit 13, Mr. Mason, and I am also handing you something that was referred to in the stipulation. Isn't it a fact that the last document I handed you is a part of the records of the Nebraska office of the Federal Housing Administration?

A. Yes, that is correct.

Q. And is that a document that was prepared under the supervision of the Nebraska office of the Federal Housing Administration pertaining to the Wherry Housing at Offutt Air Force Base?

A. Yes, it is.

Q. And will you tell the Court what Exhibit 13 is an exact copy of—a photostatic copy of?

A. It is a phot-static copy of the official FHA project analysis prepared in connection with the processing of the Offutt Housing project.

Q. I believe that the project analysis you are referring to is an analysis of the proposed rentals and operating expenses of the project, among other things, is it not?

A. Yes, that is right.

Q. State whether or not this project analysis—state yes or no, if you know, whether or not this project analysis was [fol. 186] prepared on any assumption as to whether or not any interest in the housing was subject to state or county taxation. Do you know that?

. . . . . .

A. I know.

By Mr. Reed:

Q. And is a reflection of that fact, one way or another, shown on the project analysis of which Exhibit 13 is a photostatic copy?

A. Yes; it's on page two, under "Remarks", at the bottom of the page.

Q. Now the certificate for need for military housing that prefaced the—or set into operation the official participation of Federal Housing Administration in this, shows an average monthly rental per family unit of $71.04. Do you remember that from recollection?

A. Yes.

. . . . . .

[fol. 187] By Mr. Reed:

Q. Do you know whether or not, in addition to the housing space that is furnished to the tenant at Offutt Air Force Base, whether appliances and utilities are also being furnished by the sponsor?

A. Yes.

. . . . . .

Mr. Reed: All right. Now, plaintiff offers in evidence [fol. 188] Exhibit 13.

. . . . . .

By the Court: It will be received.

. . . . . .

[fol. 189] By Mr. Reed:

Q. Did you in your project analysis see whether the average rental for the quarters furnished conformed to the certificate that the Secretary of Air as the average maximum rental?

A. Yes; otherwise we would reject the project.

Q. Now, I think I asked you the question, and I believe the answer was stricken because you referred to the document in answering. I am going to ask you if of your own independent recollection, whether or not the sponsor of the Wherry Housing Project at Offutt Air Force Base is furnishing to the military tenants, or the tenants of such housing, things something other than quarters, or space, in connection with the rentals?

. . . . . .

[fol. 190] By the Court: Answer, if you know.

A. I know.

Q. What is the fact in that regard?

A. Stoves and refrigerators, are two items.

. . . . . .

By Mr. Reed:

Q. While counsel for the defendants are examining the next exhibit I will ask you if under your processing is the sponsor required to subsequent to FHA commitment filing with your office a rent schedule in connection with Wherry Housing projects?

A. Yes, he is.

Q. And was a rent schedule furnished to your office by the sponsor of the project at Offutt Air Force Base?

A. Yes.

. . . . . .

[fol. 191] By Mr. Reed:

Q. Does your office participate or have anything to do with should there by any change in rentals in this project at Offutt Air Force Base?

A. Yes; our consent is required.

Q. And would you personally know if there has been any change in the rental arrangements after the completion of this project?

A. Yes.

. . . . . .

Q. All right, from your knowledge what is the fact with regard to that?

A. There has been no change.

Q. I am handing you Exhibit 14, Mr. Mason, and I wish you would tell the Court what that is.

A. It is a copy of Offutt Housing Company's proposed [fol. 192] rent schedule.

Q. Is that taken from the files in your office?

A. Yes, it is.

Q. As a matter of fact it is a signed copy, is it not?

A. Yes, it is.

Q. And signed by the president of the Offutt Housing Company, the plaintiff in this case.

A. Yes.

Q. Now, this shows the rent schedule to the Offutt Housing Company personnel charged by the sponsor of this project for the occupancy of the Wherry Housing at Offutt Air Force Base; does it not?

A. Yes.

* * * * * * *

Mr. Reed: Plaintiff offers in evidence Exhibit 14.

* * * * * * *

[fol. 193] By the Court: It will be received.

* * * * * * *

By Mr. Reed:

Q. All right, what is furnished by the sponsor under this rent schedule, in addition to housing space?

A. Water, janitor service, ground maintenance, decorating, laundry facilities, tubs, ranges, refrigerators; that's all.

Q. All right, now what is the—will you look at the next unit. What is the scheduled additional charge for all of [fol. 194] those extra items?

A. $4.00 per month for ranges and refrigerators, and 25¢ per month per tenant for a special water plant improvement.

* * * * * * *

Q. All right. Now, does your schedule of rents, Exhibit 14, conform to your project analysis, Exhibit 13, and conform to the certificate for the need of military housing, Exhibit 3? Do you understand my question?

A. I know that it does. These are many different figures on here; you can't do it by comparison.

Q. Well, did you check at the time the rent schedule came in to see that it did conform?

A. Yes. It must conform.

Q. Well, did it conform?
A. Yes, it did.

. . . . . .

[fol. 195] Q. Isn't there a difference on the rent schedule to cover appliances and utility services?
A. Yes sir.

. . . . . .

[fol. 196] By Mr. Reed:

Q. Now, what is the dollars and cents difference per unit covering those additional utilit-es and services?
A. $4.25.
Q. Now, Mr. Mason, in one of these Wherry Housing projects, is it required that the sponsor form a separate corporation.
A. Yes.
Q. And was that done in this case?
A. Yes.
Q. And is that done according to any criterion layed down by the Federal Housing Administration?
A. The corporation formed must conform to a model charter which the sponsor is furnished.
Q. And what is the name of the special corporation that was organized to provide this military housing?
A. Offutt Housing Company.

. . . . . .

[fol. 197] By Mr. Reed:

Q. All right. Was there an examination by your office, Mr. Mason, as to whether or not the articles of incorporation of Offutt Housing Company did conform to the requirements of the FHA? Just answer yes or no.

. . . . . .

A. Yes.

By Mr. Reed:

Q. And did the articles conform?

. . . . . .

A. Yes.

• • • • • • • •

By Mr. Reed:

Q. Now, what are the things that are passed upon by the military—and I think you have a compilation of these—the things that are passed upon by the military prior to the issuance of the certificate of necessity?

[fol. 198-200] A. Both the proposed rents and the proposed project; also the sponsorship.

Q. All right. Is there included in that a proposal that the housing specifications are suitable to the military needs at that post?

A. Yes.

Q. And as far as the military is concerned, what is the basis of their proposal as to rents?

A. It is based on their opinion of the maximum rents their personnel can pay.

Q. Can there be any change of rental after the project is built without the consent of the military?

A. No.

Q. Can any changes be made in any of the specifications of the buildings or improvements during the processing, without the consent of the military?

A. No.

• • • • • • •

[fol. 201] By Mr. Reed:

Q. What is the fact as to whether rentals will be increased in the event any interest in the Wherry Housing project is found to be taxable? as embraced in my prior question.

• • • • • • •

A. An application would be filed for increase in rents.

[fol. 202] Q. Then what would happen?

A. We would examine the merits of the request. Naturally the Commissioner is interested in the soundness of the mortgage transaction, the ability of the mortgagor to pay off the mortgage obligation, and his ability would depend

upon relief in the event of increast costs over which he has no control.

Q. What would happen rent-wise, in case of taxation?

A. The rent would have to go up.

* * * * * * *

[fol. 203] By Mr. Reed:

Q. Now, in connection with the formation of the Offutt Housing Company, do you know to whom stock was issued in that company? Just answer yes or no.

A. Yes.

Q. What is the type of stock which controls that corporation?

A. It is what is known as preferred stock, held by the FHA Commissioner.

Q. All right, wait a minute; stop there. I will ask that it go out, except that it is known as preferred stock. My next question is: To whom was the preferred stock in this corporation issued?

A. To the Commissioner of the Federal Housing Administration.

Q. How was the amount of the mortgage which—I think we can assume, can't we, Mr. Witness, that this mortgage, [fol. 204] this project, was insured by the Federal Housing Administration?

A. Yes, it was.

Q. And how was the amount of that mortgage determined?

A. This particular mortgage was limited by the legal maximum of $8,100.00 per unit; 611 units times the legal maximum of $8,100.00 produced the maximum mortgage.

Q. And that was the amount of the mortgage that was insured in this case?

A. Yes.

Q. All right. Now, where in this process does the lease between the United States and the sponsor come in?

A. The lease doesn't come into existance until we have examined the project, agreed to insure the mortgage, all closing documents and instruments have been executed; and

at that time, when the sponsor is ready to go ahead, the lease is executed and put of record.

* * * * * * * *

Cross-examination.

By Mr. Orville Entenman:

* * * * * * * *

[fol. 205] Q. The certificate was prepared by the Air Force; is that correct?

A. The Secretary of the Air Force, yes.

Q. Yes. Now, Mr. Mason, you also testified that the rentals were to be determined by the military. Doesn't the FHA office have some authority in that, too?

A. They have to be approved by both the military and the FHA.

Q. And the FHA will not, as you just testified, approve a rental that would jeopardize the mortgage, would they? or the payment of the mortgage.

A. That's right.

Q. The military, in approving or recommending the rentals, do you believe that they are entirely upon the ability of the officer or the enlisted man to pay?

A. We would have to rely upon their statement; we would have no other way of knowing, other than the information they give us.

Q. And in such instances the military would be interested in keeping the rents as low as possible, wouldn't they?

A. That's right.

[fol. 206] Q. Whether the ability to pay, or not, is involved.

A. That's right.

Q. Because if it was less rental for the mil-tary it would mean his income was more, wouldn't it, through his military service, if he was paying less rent?

A. That's right.

Q. Is the term "Sponsor" used on any of the exhibits that you have? or in your regulations?

A. Generally not. The sponsor is the party that is in the picture prior to the submission of an application, but

after an application is submitted the proposed corporate borrower is identified in the application, and from there on we are dealing with the mortgagor. Occasionally the term "sponsor" is applied, but it should be, probably, "mortgagor".

Q. Now, you stated that the FHA owned some shares of preferred stock in the Offutt Housing Corporation.

A. Yes.

Q. Is that in accordance with the Wherry Act?

A. It is in accordance with the Administrative Rules and Regulations; I don't know about the Act.

Q. How much shares does the FHA hold?

A. I wouldn't know without referring to files. I could probably find it in the files. It is a nominal amount; a small amount.

Q. And how is that paid for?

[fol. 207] A. It is paid for in cash.

Q. And is it redeemable, then, under the articles?

A. When the mortgage is paid off.

Q. When the mortgage is paid off.

A. That's right.

Q. Now, what income does that stock earn?

A. The regular dividends; whatever the corporation earns.

* * * * * * *

Q. Under your insured mortgages the FHA receives an insurance premium here.

A. Mortgage insurance premium, yes.

Q. Is that varied in those cases where the FHA has stock in the corporation?

A. It's the same. It's the same on all of our mortgage loans.

Q. Whether or not you have any stock in any corporation?

A. Yes sir, that's right.

Q. And you don't know how many shares that the FHA holds in this?

A. Not exactly. It's a very insignificant amount of stock. It's primarily for the purpose of exercising certain control in the event of certain circumstances.

Q. Do you know whether or not that stock has earned any [fol. 208] dividend for the year the annual year of 1952?

A. I don't believe that it has.

Q. Or 1953?

A. I don't believe that it's earned any dividend at all.

* * * * * * * *

Redirect examination.

By Mr. Charles S. Reed:

Q. One thing I forgot; has there been any default in this mortgage?

A. No.

Q. Now, I confused the term "sponsor" and the mortgagor here; to straighten it up, who is the mortgagor in this case?

A. Offutt Housing Company.

Q. And who was the sponsor?

A. Carl C. Wilson.

Mr. Reed: That is all.

Carl C. Wilson, called as a witness on behalf of the plaintiff, being upon his oath first duly sworn, testified as follows:

Direct examination.

By Mr. Charles S. Reed:

Q. State your name, please, and your address.

A. Carl C. Wilson, 4921 Pratt Street, Omaha.

[fol. 209] Q. What is your connection with the Offutt Housing Company?

A. I am the president of the Offutt Housing Company.

Q. Now, were you personally, or was some corporation the sponsor in this?

A. The Carl C. Wilson, incorporated, was the sponsor; a corporation of which I am president.

Q. What was the state of erection or completion of the Wherry Housing at Offutt Air Force Base on June 22nd, 1953?

A. The entire project was completed on June 6th, 1952, and all rented immediately thereafter; as the buildings were finished they were rented, and the last building was finished on June 6th.

Q. And when did the tenants begin to move into the buildings that were finished prior to that date? How early did——

A. The first tenant who moved in and paid rent was October 1st, 1951.

* * * * * * *

Cross-examination.

By Mr. Orville Entenman:

Q. What percent completed were the buildings on March 10th, 1951?

* * * * * * *

A. I could not say exactly.

Q. Do you have any estimate at all? Would they have been half, or more than half done?

[fol. 210] A. They were over half done, yes; much over half done, because we completed them on June 6th.

Q. When was the project started? the construction.

A. Early in the spring of 1951.

Q. And it took them a little more than a year.

A. Yes.

Q. Who constructed the buildings? Who was the contractor?

A. The contractor was Carl C. Wilson, incorporated.

Q. And who was the president of Offutt Housing Company?

A. I am the president of Offutt Housing Company.

Q. Do you know whether or not there were any bids on this project? on the construction?

A. Yes, I do.

Q. That is, made to Carl Wilson, incorporated?

A. There were a number of sub-contractor bids for certain sections of the work.

Q. Did you place any bid with the FHA or the Army Air Force?

. . . . . .

[fol. 211] A. We don't place any bids with them at all.

. . . . . .

By Mr. Entenman:

Q. Well, Mr. Wilson, did Carl C. Wilson, incorporated, your firm of which you are president, did they approach the Army Air Force here? or did the Army Air Force approach you? in sponsoring this project?

A. Originally we made inquiry—I am speaking of the sponsor now—we made inquiry through the Air Force as to—to secure information, and then we made inquiry as to what was required in order to be appointed sponsor; after receiving that information we were invited to make proposals if we desired, which we did, those were to the Air Force.

Q. In that proposal did you state what you would rent these houses for?

. . . . . .

[fol. 212] A. No, I did not. It hadn't gone that far yet.

By Mr. Entenman:

Q. In that proposal did you state what you would build the houses for?

A. No.

Q. Did you subsequently, then, state what you would build the houses for?

. . . . . .

A. It didn't come about that way. The proposal didn't mention money, or cost, or rentals, at that time. It was [fol. 213] required in the proposal that we furnish a landscape study, a general idea that was prepared by our architects of sketches of buildings that would house 611 families, and at that time there was no cost mentioned at all.

By Mr. Entenman:

Q. Was anything mentioned about rent, at that time?

A. Not at that time.

Q. When did they first mention to you what the rentals would be or your company.

A. As the information which we were assembling was received, it was submitted generally to the FHA and to the Air Force, informally, with the idea of course of seeing if the project was feasible, and at that time no specifications were drawn, which would of course be necessary, as to the price. I am not sure when this information reached us, but later the Air Force indicated an amount of rental they expected to pay, and wanted the buildings planned generally to meet that rental.

Q. Now, after, then, you had the discussion with the Air Force, then did you make your application for FHA insurance?

A. Not until we were appointed sponsor; and that occurred many months after the first sketches and proposals were initiated—were made.

. . . . . .

[fols. 214-215] By Mr. Entenman:

Q. Mr. Wilson, Carl C. Wilson, incorporated, constructed the buildings?

A. Yes.

Q. Who paid for those buildings.

A. The Offutt Housing Company paid us.

. . . . . .

By Mr. Entenman:

Q. Now, you stated that the first unit was occupied, the first, in October of 1951; is that right?

A. That's right.

Q. Who receives the rent from that time on?

. . . . . .

A. The Offutt Housing Company.

[fol. 216] Defendant's Case in Chief:

Mr. Entenman: Defendant calls Mr. Carl Wilson.

CARL C. WILSON, called as a witness on behalf of the defendant, having been heretofore duly sworn and testified on behalf of the plaintiff, testified further as follows:

Direct examination.

By Mr. Orville Entenman:

. . . . . .

Q. And, Mr. Wilson, when was the plaintiff corporation organized?

. . . . . .

[fol. 217] A. I am not certain of the date. I believe it was in 1950, or early in 1951.

. . . . . .

Q. Now, Mr. Wilson, you are also president of—what other company?

A. The Carl C. Wilson, incorporated.

Q. And what is the nature of their business? what type?

A. Construction of housing, and real estate.

Q. And how long has that company been in existence?

A. That company was incorporated, I believe, in 1937.

Q. Now, Mr. Wilson, did your Offutt Housing Company, the plaintiff in this case, enter into any lease agreement of any kind with the United States of America, the Air Force?

A. Yes, Yes, it did.

. . . . . .

My Mr. Entenman:

Q. Will you exercise Exhibit No. 4?

[fol. 218] A. This is a copy of the lease which we signed with the Air Force.

Q. And did you sign that on the date as shown in that copy?

A. Yes sir.

Q. And acknowledged it?

A. Yes sir.

Q. And, Mr. Wilson, on what date was that acknowledged?

A. The 18th day of January, 1951.

Q. And w-ere was that signed and acknowledged?

A. In Douglas County, Nebraska.

Q. Now, did you see the execution of this lease by the Air Force.

A. No, I didn't see the execution by the Air Force.

Q. Was that signed and brought to your office? Or where did you execute this lease?

A. This lease was executed in—I am not sure whose office it was executed at.

Q. Well, when you signed the original of which this a copy, was it signed by the Air Force, Mr. Stewart?

A. No, it was not. I didn't sign it with him.

Q. You didn't?

A. No. I signed it in Omaha.

. . . . . .

[fol. 219] Mr. Entenman: I want to know if Mr. Stewart was here, in Omaha.

Mr. Reed: Objected to as immaterial and contrary——

By the Court: You may answer. Overruled.

A. Not to my knowledge. I never seen him in Omaha. I know that I signed this in Omaha on this date.

By Mr. Entenman:

Q. On the 18th?

A. I would assume this is an exact copy; it states on the 18th of January, 1951.

Q. And when is Mr. Stewart's signature acknowledged

[fol. 220] A. On the 18th of January, 1951.

Q. And where?

A. In Washington.

Q. Now, after entering into the lease, Mr. Wilson, did the Offutt Housing Company, the plaintiff in here, then mortgage this property?

A. The Offutt Housing Company mortgaged the leasehold to the Manufacturers Trust Company.

. . . . . .

(Defendant's Exhibit No. 15 marked for identification by the reporter.)

By Mr. Entenman:

Q. Handing you what has been identified as Exhibit 15; is that your signature as the president of the Offutt Housing Company?

. . . . . .

[fol. 221] A. It is my signature, yes sir.

Mr. Entenman: The defendant offers in evidence Exhibit No. 15, the mortgage.

Mr. Reed: I make the general objection that it is immaterial to the issues to be decided in this case.

By the Court: Overruled. It will be received.

. . . . . .

By Mr. Entenman:

Q. Now handing you what has been identified as Exhibit No. 16, on which there is no stipulation; I would like to have you examine that if you will, Mr. Wilson.

A. I have examined it. It doesn't appear to be complete.

Q. No, it isn't is it?

(Additional sheets supplied.)

Is that an exact copy as you recall, of the instrument that you had recorded in Sarpy County, Nebraska?

A. It's my signature. We did not have it recorded.

Q. But it is your signature?

A. Yes, it is my signature.

Q. And do you recall executing that instrument as it appears there?

[fol. 222] A. Yes sir.

Q. And were you present when it was signed by the Secretary, also?

A. By the Douglas County Bank?

Q. By the bank.

A. I am not certain as to that; but I know I signed it.

Q. You signed this instrument, then?

A. Yes sir.

Q. You had read this instrument; knew what it was?

A. The bank prepared it, and we agreed to it.

Q. And you had read the instrument, you had read the exhibit before you signed it?

A. I don't have a definite recollection. I presume that I did.

Mr. Entenman: The defendant offers in evidence Exhibit No. 16.

Mr. Reed: Could I ask Counsel of record what the purpose of introducing the exhibit is?

Mr. Entenman: This is the limited assignment of rents; "this agreement made the 28th day of July—"

Mr. Reed: No, I don't want it read.

Mr. Entenman: For the purpose of showing the admission of the Offutt Housing Company.

Mr. Reed: Against interest?

Mr. Entenman: Yes.

Mr. Reed: All right. If that is the scope of the offer [fol. 223] of the exhibit, no objection.

By the Court: It will be received for that purpose.

* * * * * * *

Mr. Entenman: The defendant, then, offers in evidence Exhibit No. 17, being the plat.

By the Court: No objection, is there?

Mr. Reed: No, there is no objection.

By the Court: It will be received. Not withdrawn, but you will furnish a copy of it to Mr. Reed.

* * * * * * *

[fol. 224] By Mr. Entenman:

Q. Now, Mr. Wilson, then after executing this lease, and the mortgage, then the units were constructed; is that correct; the housing units?

A. Yes sir.

Q. Now, will you tell the Court what the type of construction was; the materials used?

A. The construction was brick base and first floor, and wood trim above, composition roof, concrete and concrete block basements; the small office building being entirely of brick and concrete.

Q. Were they all the same design?

A. No. There were six different floor plans, and there were I think eight different building types?

Q. Now, you say they are const-ucted of brick?

A. Brick up to the second floor, and wood trim above.

Q. How many units to a building, would they average?

A. Many of them had eight families; a few had nine; a few had four families to a building.

Q. And that is family dwellings in each building?

[fol. 225] A. In each apartment building, yes.

Q. Now, how many rooms were there to each family unit?

A. Some of the units had one bedroom; some had two; and some had three bedrooms. I think 275 of them had three bedrooms; I think about 90 of them had one bedroom; and the balance had two bedrooms.

Q. Now, what plumbing facilities were there?

A. All had mordern plumbing, complete bathrooms in each apartment, water heater, automatic, gas, and laundry sinks, kitchen sinks, of course, as well as complete baths.

Q. All right, now then, what connection was made then for sewage disposal from these houses?

* * * * * * *

A. We connected with the Air Force sewage system; we supplied the laterals, which flowed into their sewage system.

By Mr. Entenman:

Q. And then you constructed the laterals to the various housing units?

A. Yes.

Q. And did you connect at more than one place, then, with the Air Force sewer system?

A. Yes, more than one place.

Q. About how many places

[fol. 226] A. I am not certain, but I know that the sanitary system was connected entirely different from the

storm sewer system. As to how many taps we made into their lines I am not in a position to say.

Q. Did you pay anything for that? that permission to hook onto the military sewer system?

A. No payment for hooking on.

Q. Now, is there any roadways, drives or parking areas, where vehicles may be parked or stood?

A. Yes.

Q. And Exhibit No. 17, does that show those drives, driveways and parks?

A. It does not show the parks. It shows one small park that we have here.

Q. I meant the parking, is the word I meant to use.

A. It shows the indentations in the—indented street parking, yes.

Q. Who constructed those?

A. We constructed those.

Q. And surfaced them?

A. Paved them, yes; concrete.

Q. And are there storm sewers, then, or drains, connecting that system?

A. The storm sewers; the complete storm and sanitary sewer system for the entire sixty-three acres, yes.

[fol. 227] Q. That was constructed by Carl C. Wilson, incorporated, for Offutt Housing Company?

A. Yes sir.

Q. Do the units, the dwelling units, contain electrical wiring and fixtures?

A. Yes.

Q. And where did the Offutt Housing Company obtain their electricity and energy for the lights?

A. Nebraska Public Power District.

Q. And who pays for that? How is that billed.

A. We pay the bills.

Q. You pay the Power Company for the energy and electricity used in the Offutt Housing——

A. Yes, and partially we collect it in turn from the tenants.

Q. Is there a separate meter for each tenant?

A. No.

Q. Now, where is the supply of water obtained?

A. The supply of water is obtained from the Air Force pumping station and wells.

Q. None from the Metropolitan Utilities District of Omaha?

A. That is right.

Q. Is there any from the Metropolitan Utilities District?

A. No.

Q. Mr. Wilson, what arrangements are made for the disposal of garbage and trash?

[fol. 228] A. We do that; that is, the Offutt Housing Company does that.

Q. Well, would you explain to the Court how that is done? What disposal is made?

A. We have provided flush garbage receptacles back of each building, and those are cleaned and removed as one of our services to the tenants.

Q. And does the Offutt Housing itself remove that? or do you have that contracted for?

A. The Offutt Housing does that, and we have a contract for the dumping and the disposal of that with—I have forgotten his name, but he is a man that has a farm close by.

—. Mr. Cornielson?

A. I am not sure whether Cornielson is the one that is doing it now; we made a change a few months ago.

Q. Did you have a contract with Cornielson at one time?

A. We did have a contract, and I am not certain whether that contract has been changed or not; it has been changed, but whether with the same man or not I wouldn't know.

Q. Do you know how that garbage is disposed of by this contractor?

. . . . . .

A. I am not sure just where he does put it now, or did at that time; there were several places.

[fol. 229] Q. Is it disposed of on the military base?

A. No.

Q. It is taken off of the Base.

A. It is taken off of the Base.

Q. Now, Mr. Wilson, do the Offutt Housing, the plaintiff

here; besides the electric-ty and the plumbing, now, are there any other appliances in the units?

A. Yes.

Q. What other appliances?

A. Gas.

Q. And where is that obtained?

A. We buy that from the Northern Natural, through their subsidiary, the Peoples Gas Company.

Q. And who pays for that gas?

A. We pay for the gas, and bill the tenants for it.

Q. And is there a separate meter to each family unit?

A. There is a separate meter to each building, and then there are separate meters for their domestic gas. The separate meters we are concerned with are the ones that heat the building, not the gas for domestic use.

Q. Now, how many furnaces are there to each building?

A. One.

Q. And that heats the entire building?

A. Yes.

Q. What type of heat is that?

[fol. 230] A. Automatic gas.

Q. I mean the type of the plant.

A. Hot water.

Q. Hot water?

A. Yes sir.

Q. But that is furnished by the Offutt Housing Company to the tenants?

A. And charged to them.

Q. The heating?

A. Yes, the heating is charged to them, in a separate billing.

Q. And how do you determine how each family pays?

A. We pro-rate it according to the square foot area.

Q. And is there gas used for cooking and the refrigerators; is that metered to each apartment?

A. The gas for cooking is metered to each apartment.

Q. Do they pay directly? or do they pay through Offutt Housing?

A. They pay directly for the domestic gas.

Q. They are billed by the gas company?

A. Yes.

Q. Now, besides this furnace and the water heater are

there any other appliances now that are furnished with each family unit?

A. Yes.

Q. What are they?

A. We furnish washers and driers, in addition to the stoves and refrigerators.

[fol. 231] Q. And are these washers and driers, is there a washer and drier for each unit?

A. No; for each building. Ref-igerator and stove for each apartment.

Q. Now, who owns the washers and driers?

A. The Offutt Housing Company.

Q. And who owns the refrigerators and the stoves?

A. The Offutt Housing Company.

* * * * * * *

By Mr. Entenman:

Mr. Wilson, you stated that the stoves and refrigerators, and those appliances, are furnished by the Offutt Housing.

A. That is right.

Q. And who maintains the streets and driveways you stated that you had——

A. The Offutt Housing maintain the streets and drives.

Q. And does the Offutt Housing hire any watchmen or policemen?

A. We do not police the project, no.

Q. And what facilities are there for fire protection?

A. The Offutt Housing pays the Air Force per hour for any time their fire fighting equipment is called.

[fol. 232] Q. Mr. Wilson, when you rent the units to the tenants, the military personnel, is there a written lease executed by the tenant?

A. Yes.

Q. Now, in your experience as the Offutt Housing, who is permitted to stay there? besides the military man that has signed the lease and his family, are there any rules and regulations as to who else can stay in those over night, or any period of time?

* * * * * * *

A. We make no restrictions in our lease as to visitors.

By Mr. Entenman:

Q. And what length of time would it be considered they were visitors? Supposing a military man moved his father and mother in there?

A. We make the lease for one year; and we make no mention of visitors whatever.

Q. Or the number of persons?

A. Yes; excepting that we do not permit sub-leasing.

Q. Sub-leasing.

A. Yes.

Q. How long have you been engaged in the building and rental of houses; in that business?

A. Forty-two years.

[fol. 233] Q. Now, from your experience, then, with the const-uction of houses, and the building, and renting of houses, what would be the expectancy of these units that were constructed at Offutt Field?

. . . . . .

A. We, in our thinking, rather go along with the FHA and the mortgage folks, who put a thirty-five year life on these buildings.

By Mr. Entenman:

Q. Mr. Wilson, the stoves and the electric refrigerators, was it necessary to finance them? or have you fully paid for them?

A. No, they are still being financed.

Q. And were they under chattel mortgages or conditional sales contracts?

. . . . . .

A. They were purchased under sales contract.

By Mr. Entenman:

Q. And were those filed for record, if you know? Do you know whether they were?

[fol. 234] A. I heard they were; but I have never looked it up.

By Mr. Entenman:

Q. And do you know where they were filed?
A. I don't know.

By Mr. Entenman:

Q. Mr. Wilson, do you know how many persons, that is, both the tenant, the military man, and his wife and children, are occupying the Wherry Housing now?
A. I do approximately.
Q. And what is that, approximately?
A. There are approximately twenty-five to twenty-six hundred people living on the project now.
Q. And, Mr. Wilson, are there any grocery stores, or service stations, or anything like that, connected with this project?
A. Our lease does not permit any commercial whatever.

Cross-examination.

By Mr. Charles S. Reed:

Q. Mr. Wilson, this Exhibit 16 contains the statement, "Whereas Offutt Housing Company is the owner of 611 units, located at Offutt Field, Sarpy County, Nebraska," did you read that exhibit sufficiently before you signed it to know that phraseology was in there?
[fol. 235] A. I did not observe the phraseology until you called my attention to it; the words, "owner of".
Q. I think you said this was something which the Douglas County Bank prepared as security and asked you to execute it?
A. That's right.
Q. Was there a subsequent agreement pertaining to these assignments of rents between you—a supplemental agreement between you and Douglas County Bank?
A. Later there was a modification of this agreement prepared, which we executed.

. . . . . .

Q. Handing you Exhibit 18; is that a copy of the supplemental agreement pertaining to the assignment as security, to the Douglas County Bank?

A. Yes sir, it is.

Mr. Reed: Plaintiff offers in evidence Exhibit 18.

. . . . . .

[fol. 236] By the Court: It will be received. What is the phraseology that clarifies the alleged admission against interest?

. . . . . .

By Mr. Reed:

Q. Now, I would assume from what we said about your experience at the Douglas County Bank that you must have borrowed some money from them in connection with the payments for this project; is that right?

A. That's right.

Q. What has been your experience, profitwise, with this project since it has been occupied by the military?

A. So far it has not been profitable.

Q. Now, the County Attorney asked about roads. There is a road that runs in front of your rental office, and leads [fol. 237] around to what is known as the Bellevue gate, that runs across the edge of your leased property, doesn't it?

Q. Now, who maintains that road?

A. The roads there are maintained by the Offutt Air Force Base, and we maintain the roads within.

Q. Within what?

A. Within the confines of our lease.

Q. Well, now, wait a minute; isn't that road that runs in front of and around your property partly on your leased premises?

A. No.

Q. It is not?

A. That is right.

Q. But that is an access road to your——

A. That's right.

Q. And that is maintained by the Air Force?

A. That's right.

Q. I think you testified on direct examination that you

secure water from the Offutt Air Force Base water facilities.

A. Yes.

Q. Do you happen to know whether the Air Force had to expand that in order to serve this project?

A. Yes, I know that.

Q. Do you know approximately what it cost the Air Force to expand that?

[fol. 238] A. The Air Force informed us that they were required to expand the capacity of their plant at a cost of about forty thousand dollars.

Q. Incidentally, this Exhibit 16 that I have referred to; that's that assignem-t to the Douglas County Bank; has that obligation been paid?

A. It has been paid, and assignment released.

* * * * * * *

By Mr. Reed:

Q. Mr. Wilson, are you required under your arrangement with the Air Force to maintain these appliances that are the Wherry Housing at Offutt Air Force Base?

A. Yes.

Q. And are you required to replace them, keep them in service or replace them as they wear out?

[fol. 239] A. That's right, yes sir.

Q. If these appliances or their replacements exist at the end of your lease, what happens to them?

* * * * * * *

A. We are required to leave them there; surrender them to the Air Force.

* * * * * * *

Q. All right, what was the state of absolute final completion of the buildings on March 1, 1952?

A. On March 1st, 1952, we calculated at that time seventy-four percent completed.

Q. Did you have a report daily? would you have had a report as of March 10th in your records?

[fol. 240] A. Yes. We usually made a report on the first, then on the 10th, and 25th.

Q. Did you check that?

A. I checked that with my office; and our best estimate on March 10th would be about seventy-eight percent.

Q. Now, those are the number of units that were ready for occupancy on that date?

A. Yes.

Q. All right, structurally what was the condition of the rest of the units on March 10th?

A. On that date there were a number of things incomplete, such as painting, linoleum, setting of the plumbing fixtures, yard work.

Q. I don't think we are interested in the yard.

A. That's about all.

Q. Had all the structural work, except those things, been done on all of the buildings on March 10, 1952?

A. The structures were finished at that time; I mean the buildings were up and carpenters were finished; the plumbing wasn't all in, and these things I checked.

Q. Had the plastering been finished?

A. Yes.

Q. And hardware in it, and things like that?

A. They had been finished except the items I referred to here, such as plumbing, and painting, and linoleum.

[fol. 241] Q. Then, except for those items, the buildings were all completed on March 10th, 1952?

A. Yes. The item I forgot was electric fixtures, also, were not in. Aside from those, those items were all done.

Q. Were the fixtures on site at that time?

A. Not all of them.

Q. Now all of them. Now, were you required to have somebody pass on them as being finished before you could offer them for occupancy?

A. We made an occupancy—that is, we made a report and asked an occupancy permit.

Q. Who did you ask that from?

A. We asked that from the FHA; and that was the date I gave you, on as of June 6th, the last occupancy approval we received on that date.

Q. Does that necessarily mean that the last lick of work was done on that date; or is that the time that they gave you approval as being ready for occupancy?

A. Everything had to be done then.

Q. Had it been done before that date? or——

A. Yes. That was the date on which the last work was done on *on* the last building.

Q. All right. Now, after you got them completed was there a period of time elapsed to clean them up and get them ready for occupancy after all of this structural work of [fol. 242] every kind including plumbing and everything had been done was there a little clean-up period there before you submitted them for certificate of occupancy, or whatever it is; or occupancy permit?

A. That's right.

Q. And I think you have testified that on the day of this return they were all completed, including every detail, all of the buildings.

A. That was on June 6th, 1952; yes, I did.

* * * * * * *

[fol. 243] Q. Now, Mr. Wilson, you have been in the construction business quite a while, haven't you?

A. Yes.

Q. You testified that the life of these buildings was estimated to be thirty-five years, did you not?

A. I did.

Q. Based upon your experience, these buildings, with proper maintenance and repair, this type of construction; could these buildings be maintained and repaired to have a longevity in excess of the term of the lease?

A. Yes, they could.

Q. Would you deem it profitable for Offutt Housing Company to maintain and repair them so that their longevity will exceed the term of the lease.

A. Do you mean the term of the seventy-five year lease?

Q. Yes sir.

A. I have always considered that any building that was seventy-five years old was not worth maintaining any farther than that.

Q. I don't — whether it is a fact, but isn't it a fact that in case of certain emergencies that your lease can be terminated, under a formula?

A. Yes.

Q. During the life of the lease?

A. Yes.

[fol. 244] Q. Under those circumstances to whom would the appliances therein pass? what would happen to them?

A. They would pass to the mortgagee if they were mortgaged then; but if the mortgage were paid off, then they would pass to the Air Force.

Q. Or to the United States?

A. The Army Air Force, United States Army.

Mr. Reed: That is all.

Redirect examination.

By Mr. Orville Entenman:

Q. Do you have any agreement to that effect, with the United States Air Force?

A. I think it is all in the regulations; that they may take this over on appraisal if it is needed at any time.

Q. I mean as to the appliances; the stoves and the refrigerators.

A. Yes.

Q. Do you have an agreement outside of the lease that has been put in evidence here?

A. I believe so. And when I say I believe so, I know that such an agreement had to be made, concurred to by the Manufacturers Trust, at the time these conditional sales contracts were made.

Q. Well, who holds the mortgage interest now in the stoves and refrigerators?

A. There are two chattel mortgages—rather, two chattel [fol. 245] mortgagees; one is the GMAC, General Motors Acceptance Company, and the other is the First National Bank of Omaha.

Q. None of those were ever assigned to Manufacturers Trust?

A. No, although Manufacturers Trust signed the agreement permitting the purchase under sales contract.

Q. But they furnished no money for them?

A. The manufacturers Trust furnished no money, no.

Q. Mr. Wilson, did you ever file a personal schedule for Offutt Housing Company?

A. I am not certain whether we did or not. I could not answer that. The secretary may have done so; or I may have signed such a thing, but I don't remember.

* * * * * * *

GEORGE NICHOLSON, called as a witness on behalf of the defendant, being upon his oath first duly sworn, testified as follows:

Direct examination.

By Mr. Orville Entenman:

Q. Will you state your name, please?
A. George Nicholson.
Q. And what is your address, Mr. Nicholson?
A. Papillion, Nebraska.
Q. And what is your official capacity?
[fol. 246] A. County Clerk, Sarpy County, Nebraska.

* * * * * * *

Q. And on the 20th day of April, 1954, were you the duly elected, acting and qualified County Clerk of the County of Sarpy, Nebraska?

Mr. Reed: To save time, I will admit his qualifications as County clerk.

* * * * * * *

By Mr. Entenman:

Q. Now, handing you what the reporter has marked Exhibit No. 20, I will ask you to examine that.
A. That's a warranty deed.

* * * * * * *

[fol. 247] Q. And do you have custody of those records?
A. Yes sir.
Q. And is Exhibit No. 20 a photostatic and true copy of that instrument recorded in Book 67, at page 415?
A. It is.

Mr. Entenman: The defendant offers in evidence Exhibit No. 20.

. . . . . .

[fol. 248] By the Court: It will be received.

. . . . . .

(Defendant's Exhibit No. 21 marked for identification [fol. 249] by the reporter.)

. . . . . .

[fol. 250] By the Court: The objection is overruled, and this will be received. Exhibit 21 is received.

. . . . . .

(Defendant's Exhibits No. 22, 23, 24, 25, 26 and 27 marked for identification by the reporter)

. . . . . .

By the Court: What are the numbers?

Mr. Entenman: Numbers 22, 23, 24, 25, 26, 27, 28 and 29.

[fol. 251] Mr. Reed: The plaintiff will waive examination by the witness as to his position, qualification, and examination of the witness as far as examination of the witness would go to lay the foundations for these exhibits, without waiving any objections as to their materiality.

By the Court: By that you mean admitting that they are official records in his office.

Mr. Reed: I will waive his being required to testify that.

. . . . . .

Mr. Entenman: All right. The defendant then offers in evidence Exhibits 22, 23, 24, 25, 26, 27, 28 and 29.

. . . . . .

Mr. Entenman: The exhibits are conditional sales contracts for the appliances, including stoves and refrigerators.

By the Court: From Offutt Housing Company to someone; is that right?

Mr. Entenman: Yes. Some of them are, as he says, General Motors, as he has testified here; some of them are to the First National Bank of Omaha.

[fol. 252] Mr. Reed: In recalling the argument on this, I would like, if it is in order, to ask counsel the purpose for which these are offered.

Mr. Entenman: Twofold. . .

Mr. Reed: As I remember at the time of our argument of the motion to strike counsel said and succeeded in having them left in on the ground that it shows use of the administrative offices here; so I would like to ask counsel the purpose.

Mr. Entenman: That is one purpose. The primary purpose, I am contending that here is a private organization using the government facilities, which I think is important here, particularly in the equity case. And that is the first reason. Second, there is the question here of the ownership of the personal property. He has also asked to have the Treasurer enjoined from collecting any tax on this personal property; and this personal property that is shown by these conditional sales contracts and chattel mortgages are part of the property listed in the personal tax schedules.

Mr. Reed: In view of the counsel's statement of the reason for his offer, I renew my objection.

By the Court: Overruled. They will be received for the purpose offered.

[fol. 253] Cross-examination.

By Mr. Charles S. Reed:

Q. Mr. Nicholson, were the regular fees paid for the filing of these contracts, as far as your records are concerned?

A. As far as our records show, they are.

. . . . . .

By the Court: At this point, with reference to the request that was made by Mr. Reed in connection with the admission by the Court of Exhibits 20 and 21, being two deeds to part of a tract of land involved; is there any dispute at all by the defendant? or is it conceded by the defendant that the

balance of the tract of real estate upon which the housing units involved are located is in the United States of America, the same as the portion shown on the deed by the Chamber of Commerce?

Mr. Entenman: I don't want to admit it, but I haven't disputed it.

[fol. 254] By the Court: The title to the ground upon which the housing units are erected is in the United States of America, is it not, the same as this deed here purporting to that?

Mr. Entenman: Yes.

By the Court: And for the purpose of admitting Defendant's Exhibits 20 and 21, it is solely because they are part of your pleading, and I am not going to deny you the right to have of record here the fact that a portion of this property is a gift from the Chamber of Commerce. I personally don't see the materiality of it, the same as Mr. Reed mentioned, but if you want it in the record you can have it in the record.

Mr. Reed: May I amplify that?

Mr. Entenman: I think the first exhibits here, the acceptance by the United States Government, after 1940.

Mr. Reed: If your *your* Honor please, that does not cover what your Honor has in mind. They are not described in such a way that you could identify those notifications to the governors of accepting jurisdiction as to whether or not it involves land on this base that is involved in this lease; and so I would like to clarify it if I might.

[fol. 255] May we understand, Mr. Entenman, that it is admitted by the defendant that the balance of the land involved in the lease, which has been introduced herein as Exhibit No. 4——

Mr. Entenman: I don't have any doubt but what title is in the United States Government; I think from the map it shows that.

Mr. Reed: Well, I hadn't completed what I wanted to ask you yet.

By the Court: Go ahead and ask what you want to. I didn't think there was any dispute about that, but upon this particular tract that was an enlargement on which part of these units were built you wanted to get in the record that it was a gift from the Chamber of Commerce of Omaha;

so I am not going to deprive you of having that in the record; but so as not to have to compel you to go downstairs and get the record on all the balance of the tract of land upon which the rest of the units are located, do you admit that they are on land the title to which is in the United States of America?

Mr. Entenman: Yes.

By the Court: Well, that's all they want to know.

Ernest Nielsen, called as a witness on behalf of the defendant, being upon his oath first duly sworn, testified as follows:

[fol. 256] Direct examination:

By Mr. Orville Entenman:

Mr. Reed: I don't want to deprive you of any pleasure, but if it will save time I will admit that the witness is the County Assessor of the defendant county, was so on March 10th and June 22nd, 1952.

By the Court: The record may so show.

By Mr. Entenman:

Q. Mr. Nielsen, were you Assessor for the year 1952?

A. I was.

Q. And—— Will you state your name, please?

A. Ernest Nielsen.

Mr. Entenman: Now, we have, then, the waiver of qualification.

By the Court: Yes.

* * * * * * *

By Mr. Entenman:

Q. Have you searched your records, or examined your [fol. 257] records, as to whether or not the Offutt Housing Company filed any personal schedule for the assessment of their personal property for the year 1952?

A. I have made a search.

Q. And what did you find after your search?
A. What did I find? I found no return.
Q. And did you prepare a return then?
A. I did.
Q. And was that ever executed or signed by the Offutt Housing Company?

Mr. Reed: Now, will you refer what you are asking?

By Mr. Entenman:

Q. To the 1952 return, also known and identified here as Exhibit No. 5.
A. What was the question, again?
Q. Was that ever executed or signed by Offutt Housing Company?
A. It was not.
Q. And who is it signed by?
A. Myself.
Q. Did you make any search or examination of the records of your office for the assessment for the year 1953?
A. I did.
Q. And was that ever—any schedule filed in your office by the Offutt Housing Company?
A. There was not.
Q. And was a schedule prepared?
[fol. 258] A. There was one prepared by myself.
Q. And who signed it?
A. I did.
Q. And is that a copy of it there? Exhibit No. 6.
A. It is.

Mr. Entenman: That is all.

Cross-examination.

By Mr. Charles S. Reed:

Q. Mr. Nielsen, when you prepared—— Wait a minute! Let me ask you: Exhibit No. 5 is a carbon of the one that you made and left of record in your office; was it not?
A. It's the one, I think, that I mailed to you people.
Q. Yes, but it is a carbon of the one left in your office?
A. Yes.

Q. You didn't mail anything in 1952 to me, did you?
A. I mailed it, I think, to Mr. Wilson.

• • • • • • •

Q. Now, under this item, "'Improvements on leased land'', was that your opinion as to the value of those buildings on Offutt Air Force Base?
A. It was.
Q. And on Exhibit No. 6, was that your opinion as to [fol. 259] the value of the buildings—Wherry Housing buildings on Offutt Air Force Base?
A. It was.

Redirect examination.

By Mr. Orville Entenman:

Q. Mr. Nielson, were the assessments for 1952 based on a completed project?
A. No, it wasn't completed at that time.

• • • • • • •

[fol. 260] By Mr. Entenman:

Mr. Nielsen, what is the assessment for property in Nebraska?

• • • • • • •

A. From March the 10th to April the 20th.
Q. March the 10th——
A. To April 20th.
Q. What date in determining the value of improvements that are in the process of construction?
A. What date?
Q. Do you use?
A. Well, I can use up until July first if I want to, percentagewise, as to fifty or sixty percent completed. Is that the question you mean?
Q. Yes.
A. Yes.
Q. And when you made the assessment of the Wherry

Housing for the year 1952, tell the Court what you did in determining that assessment.

[fol. 261] A. Well, I first went down to the grounds. I had a little difficulty of getting on there, through the guards, but I wasn't in any of the homes; I was allowed to drive around there, and then I came back, and—I don't know, I tried to contact the Offutt Housing or Mr. Wilson, I think it was, through their representative, an Mr. Hendricks, Hendrickson or Hendricks, or something, but we didn't seem to be getting anywhere, so then I finally went to the records that are in the County Clerk's office as to the mortgage records, and things like that, and I worked from that, and taking the usual percent that we do in any assessment as to completion and things of that order.

Q. Do you recall what figure you used, or what percentage you used for the completion?

A. I recall—if I had known I was to be up here I have my records in my office as to the percentages of where I got these figures, but I just came up here without them, and just couldn't answer as to what percentage we used then; I just don't recall it now.

Q. Of the completion?

A. Well, if I remember right, I think it was fifty percent, or seventy-five; but I have forgotten just now; but I do have it in my files down in my office. In '52 you are [fol. 262] speaking about?

Q. '52, yes.

A. In '53 I used it as complete.

Mr. Entenman: That is all.

Recross-examination.

By Mr. Charles S. Reed:

Q. Mr. Nielsen, on what date did you drive around Wherry Housing, in 1952?

A. What date? I wouldn't say as to the date, because I didn't make a record of that; but it was sometime between March the 10th and April 20th, I know, because I had done a lot of corresponding with the Company, and finally got no results, so I put it on that way, I think.

Q. Did you make a computation when you were there as to the number of buildings that had been completed?

A. No, I don't think I did that; but I do know there was——

Q. Just answer my question. You may stop at that. Did you go inside any of the buildings to see if they were completed?

A. No, I could not; they wouldn't let me.

Q. Just answer; did you go inside any of them?

A. No.

Q. And did you know when you made this return, Exhibit 5, how many buildings were completed at any date, any given date between March 10th and June 22nd?

A. In '52?

[fols. 263-264] Q. Yes?

A. I will say "No" to that.

Q. And could you tell by your drive around the project how many buildings were completed in the project?

A. Yes, I could tell at that time; sure I could; but I don't remember it now.

Q. Now, isn't it a fact that all of the exteriors of these buildings were completed on the date that you say you went over there?

A. Well, it could be possible, but I don't think they were, myself.

Q. All right, was any work being done on the exterior of any of these buildings at the time you were there?

A. At the exterior?

Q. Yes.

A. If there was, I didn't see it.

Q. All right. And you didn't go inside any of the buildings?

A. I did not.

[fol. 265] EXHIBIT 1

IN THE DISTRICT COURT OF SARPY COUNTY, NEBRASKA

Doc. U No. 6685 No. 350

OFFUTT HOUSING COMPANY, a Corporation, Plaintiff,

vs.

COUNTY OF SARPY and ROBERT M. EBY, Treasurer of County of Sarpy, Nebraska, Defendants

Stipulation of Fact

Subject to the relevancy and materiality of the various admissions contained herein, it is stipulated by and between Offutt Housing Company, plaintiff, and the defendants, County of Sarpy and Robert M. Eby, Treasurer of County of Sarpy, Nebraska.

That the allegations contained in paragraph I of plaintiff's petition are true.

That Offutt Air Force Base is a permanent military base of the United States and is located entirely in Sarpy County, Nebraska.

That Exhibit B attached to plaintiff's petition is a true copy of a certificate executed by Harold C. Stuart, Acting Secretary of the Air Force, and certified to Federal Housing Administration on January 15, 1951.

That Exhibits A and A-1, attached to plaintiff's petition, are true and certified copies of notification letters by therein designated representatives of the United States, delivered to the therein named governors of the State of Nebraska, the receipt of which was acknowledged by the designated governors of Nebraska upon receipt of such notification letters.

No part of Offutt Air Force Base is within any municipality and that no city or school district taxes are involved in this action.

That Exhibit C, attached to plaintiff's petition, was executed by the parties designated therein on January 18, 1951, and that an executed copy thereof was, on January 31, 1951, recorded in the office of the Register of Deeds of Sarpy County, Nebraska, in Book 14 of the Miscellaneous Records

of Sarpy County, at page 567, and that such lease is still in full force and effect.

That Exhibit D attached to plaintiff's petition is an exact copy of a purported personal property schedule of plaintiff's property executed by the County Assessor of Sarpy County, Nebraska, on June 23, 1952.

[fols. 266-267] That Exhibit A attached to the answer of County of Sarpy is a true and correct copy of a filing made on February 6, 1951 in the office of the Sarpy County Register of Deeds at Book 1 of Plats at page 96.

That Exhibit B attached to the answer of County of Sarpy is a true and correct copy of a mortgage executed by the therein designated parties and recorded on February 6, 1951 in the office of the Register of Deeds of Sarpy County in Mortgage Records No. 63 at Page 173.

Offutt Housing Company, By Charles S. Reed, Howard W. Selling, Its Attorneys. County of Sarpy, By Orville Entenman, County Attorney, Robert M. Eby, Treasurer of County of Sarpy, Nebraska, by Orville Entenman, His Attorney.

[fol. 268] Secretary of State's Certificate to following paper omitted in printing.

[fols. 269-270] [Stamp:] Filed September 27, 1950. Frank Marsh, Secretary of State, by D. F. Whalen, Deputy

EXHIBIT 2

Received Sep. 11, 1950, Governor's Office.

DEPARTMENT OF THE AIR FORCE
WASHINGTON

Office of the Assistant Secretary

Sep. 7, 1950.

DEAR GOVERNOR PETERSON:

The laws of the State of Nebraska (an act of the Legislature of the State of Nebraska approved February 22, 1883 (Nebraska Laws, 1883, chap. 40, p. 335), and an act of the

Legislature of the State of Nebraska approved March 30, 1889 (Laws of Nebraska, 1889, chap. 64, p. 496); see also, Revised Statutes of Nebraska, 1943, sections 72-601 to 72-605, inclusive) provide that exclusive jurisdiction is ceded to the United States for military and certain other purposes.

Under Section 355, Revised Statutes, as amended by the act of February 1, 1940 (54 Stat. 19) and by the act of October 9, 1940 (54 Stat. 1083; 40 U. S. C. 255), it is provided in effect that unless and until the United States has accepted jurisdiction as therein prescribed over lands acquired or in which any interest shall have been acquired after February 1, 1940, it shall be conclusively presumed that no such jurisdiction has been accepted.

Accordingly, notice is hereby given that the United States accepts exclusive jurisdiction over 48.11 acres of land, more or less, located in Sarpy County, Nebraska, and used in connection with a military reservation officially designated Offutt Air Force Base. The land was acquired by the United States by warranty deed dated October 21, 1949, from the Omaha Chamber of Commerce, Omaha, Nebraska.

Return of the duplicate of this communication with your indorsement thereon designating time of receipt of this acceptance by your office, will be appreciated.

Sincerely yours, Harold C. Stuart.

Honorable Val Peterson, Governor of Nebraska, Lincoln, Nebraska.

[fol. 271] Judge Advocate's Certificate to following paper omitted in printing.

[fol. 272] EXHIBIT 2-A

WAR DEPARTMENT
WASHINGTON

April 21, 1943

Honorable Dwight Griswold,
Governor of Nebraska,
Lincoln, Nebraska.

DEAR GOVERNOR GRISWOLD:

The laws of the State of Nebraska (an act of the legislature of the State of Nebraska approved February 22, 1883 (Nebraska Laws, 1883, chap. 40, p. 335), and an act of the legislature of the State of Nebraska approved March 30, 1889 (Laws of Nebraska, 1889, chap. 64, p. 496); see also Compiled Statutes of Nebraska, 1929, sections 72-601 to 72-605, inclusive) permit the assumption of exclusive Federal jurisdiction over lands within that State, acquired by the United States for military and certain other purposes.

Under section 355, Revised Statutes, as amended by the act of February 1, 1940 (54 Stat. 19), and by the act of October 9, 1940 (54 Stat. 1083; 40 U. S. C. 255), it is provided in effect that unless and until the United States has accepted jurisdiction over lands acquired or in which any interest shall have been acquired after February 1, 1940, it shall be conclusively presumed that no such jurisdiction has been accepted.

Accordingly, notice is hereby given that the United States accepts exclusive jurisdiction over all lands acquired by it for military purposes within the State of Nebraska, title to which has heretofore vested in the United States, and over which exclusive jurisdiction has not heretofore been obtained.

It is requested that you return the inclosed copy of this letter, with an indorsement thereon over your signature stating the date of your receipt of this notice.

Sincerely yours, Henry L. Stimson, Secretary of War.

Identical letters from Secretary of War to the Governor of Nebraska (R. 276-8) dated January 3, 1944, August 8, 1944 and July 27, 1945, omitted in printing.

[fol. 273] June 17, 1942

Honorable Dwight Griswold,
Governor of Nebraska,
Lincoln, Nebraska.

DEAR GOVERNOR GRISWOLD:

With funds appropriated by the First Supplemental National Defense Appropriation Act, 1941, approved June 26, 1940 (54 Stat. 599), and the Second Supplemental National Defense Appropriation Act, 1941, approved September 9, 1940 (54 Stat. 872), the United States has acquired 94.02 acres of land, more or less, located in Sarpy County, State of Nebraska, for use in connection with Fort Crook.

Notice is hereby given that the United States accepts exclusive jurisdiction over these lands, effective as of the 22nd day of June, 1942, at 10:00 a. m. The transfer of such jurisdiction has been authorized by virtue of the provisions of an act of the Legislature of the State of Nebraska, approved March 30, 1889 (Laws of Nebraska, 1889, Chap. 64, p. 496).

The lands covered by this acceptance are those acquired by the United States:

1. By deed dated May 16, 1941, from Vesta Curp, nee Lagan, and Lyndon Curp, her husband, et al., recorded in Deed Book 57, page 663, in the land records of Sarpy County.

2. By judgment dated March 13, 1941, on the Declaration of Taking in the condemnation proceeding entitled United States of America v. 8.33 acres of land, more or less, situate and located at Fort Crook in Sarpy County, State of Nebraska, and Herman Platt, et al. (No. 210 Civil), filed March 13, 1941, in the District Court of the United States for the District of Nebraska, Omaha Division. With respect to 5.39 acres of said land, a permanent and perpetual easement for a right-of-way for an outfall sewer conduit was acquired, and the said easement is not covered by this notice of acceptance.

3. By judgment dated February 27, 1941, on the Declaration of Taking in the condemnation proceeding en-

titled United States of America v. 68.01 acres of land, more or less, situate and located at Fort Crook in Sarpy County, State of Nebraska, Frank H. Prucka and John J. O'Hearn, et al. (No. 205 Civil), filed February 27, [fol. 274] 1941, in the District Court of the United States for the District of Nebraska, Omaha Division.

4. By judgment dated April 15, 1941, on the Declaration of Taking in the condemnation proceeding entitled United States of America v. 16.52 acres of land, more or less, situate and located at Fort Crook in Sarpy County, State of Nebraska, and John R. Williams, et al. (No. 219 Civil), filed April 15, 1941, in the District Court of the United States for the District of Nebraska, Omaha Division.

Return of the duplicate copy of this letter, with your indorsement thereon designating time of receipt of this acceptance by your office, would be appreciated.

Sincerely yours, Henry L. Stimson, Secretary of War.

Received, June 25, 1942 10:00 a. m. Dwight Griswold, Governor of Nebraska, Lincoln, Nebraska.

[fols. 275-279] November 13, 1942

Honorable Dwight Griswold,
Governor of Nebraska,

Lincoln, Nebraska.

DEAR GOVERNOR GRISWOLD:

The United States has acquired 126.32 acres of land, more or less, located in Sarpy County, State of Nebraska, for use in connection with the Fort Crook Ordnance Motor Base. This land was acquired by a Declaration of Taking dated August 18, 1942, which was filed on August 28, 1942, in the condemnation proceeding entitled United States of America v. 119.79 acres of land, more or less, situate in Sarpy County, State of Nebraska, and Herman Platt, et al. (Civil Action No. 356), in the United States District Court in and for the District of Nebraska.

Notice is hereby given that the United States accepts exclusive jurisdiction over this land, effective as of the 30th

day of November, 1942, at 10:00 a. m. The transfer of such jurisdiction has been authorized by virtue of the provisions of an act of the Legislature of the State of Nebraska, approved February 22, 1883 (Nebraska Laws, 1883, chap. 40, p. 335).

Return of the duplicate copy of this letter, with your indorsement thereon designating time of receipt of this acceptance by your office, would be appreciated.

Sincerely yours, Henry L. Stimson, Secretary of War.

The original of this letter of acceptance was received in the Office of the Governor on the 20th day of November, 1942.

Dwight Griswold, Governor of the State of Nebraska.

[fols. 280-281] EXHIBIT 3

FHA Form No. 3301.

CERTIFICATION OF NEED FOR MILITARY HOUSING

(The original and a copy are to be filed with the FHA insuring office as an exhibit to the application for mortgage insurance under Title VIII of the National Housing Act)

Date 15 January, 1951.

To Federal Housing Administration

This certification is made in connection with an application for mortgage insurance to be filed with the FHA by the Mortgagee to finance the construction of a housing project, more particularly described in such application, and being identified as a proposed Military Housing Project for Offutt Air Force Base, Nebraska, AF-31; Carl C. Wilson, Incorporated, City National Bank Building, Omaha 2, Nebraska.

Number of family units in multifamily structures 611.

Number of single-family structures 0.

Average monthly rental per family unit $71.04.

In accordance with the provisions of Section 803 (b) (2) of Title VIII of the National Housing Act, the undersigned,

as the duly authorized designee of the Secretary of Defense, hereby certifies that:

> the above identified housing project is necessary to provide adequate housing for civilian or military personnel (including government contractors' employees) assigned to duty at the military installation named above; such military installation is deemed to be a permanent part of the Department of the Air Force; there is no present intention to substantially curtail the activities at such installation; and based on the official records of the said Department, the military and civilian personnel who will be expected to occupy the dwelling units described above and for whom the project is intended, should be able to pay the proposed average monthly rentals per family units as stated.

This certificate supersedes certificate dated April 24, 1950.

Harold C. Stuart, Acting Secretary of the Air Force.

[fol. 282]

EXHIBIT 4
Geo. F. Nicholson

County Clerk of Sarpy County
Papillion, Nebraska

I, Geo. F. Nicholson, duly elected and qualified Clerk of the County of Sarpy, State of Nebraska, do hereby certify that the photostat copy is a true copy of the Lease. Recorded in Book 14 page 576 of Miscellaneous Record, in the County Clerks office at Papillion, Nebraska. Dated this 16th day of April 1954.

Witness my hand and seal.

Geo. F. Nicholson, County Clerk.

Plft's Ex. No. 4, Roy J. Peterson, Court Reporter.

[fol. 283] EXHIBIT 4

DEPARTMENT OF THE AIR FORCE

Lease for Private Housing

To be insured under Title VIII, National Housing Act on Offutt Air Force Base, Omaha, Nebraska.

Contract No. AF 25 (010)-210

This lease, made between the Secretary of the Air Force, party of the first part, representing the United States of America (hereinafter called the Government), and Offutt Housing Company, a corporation organized and existing under the laws of the State of Nebraska, with principal place of business at 918 City National Bank Bldg., Omaha, Nebraska, (hereinafter called the Lessee), party of the second part.

Witnesseth:

That, under authority of the Act of August 5, 1947 (10 U.S.C. 1270) and the Act of August 8, 1949 (P.L. 211, 81st Cong.) the Secretary of the Air Force has determined that the lease of the hereinafter described premises will effectuate the purpose of Title VIII, National Housing Act (P.L. 211, 81st Cong.) and the Secretary, in consideration of the observance and performance by the Lessee of the covenants and conditions hereinafter set forth, hereby leases to the lessee for a period of seventy-five (75) years, commencing on the date of final execution of this lease by the Government and by the Lessee, subject to termination as hereinafter provided, the land as hereinafter described, to be used for the purpose of erecting, maintaining and operating a housing project, consisting of approximately 611 units, substantially in accordance with the outline plans and specifications submitted to the Department of the Air Force and in accordance with the detailed plans and specifications to be approved by the Federal Housing Commissioner (hereinafter referred to as the Commissioner). It is understood that if the mortgage which the Commissioner approves for insurance covers a project containing less units than the number specified above, this lease may be renegotiated [fol. 284] to reduce the area included herein to a size that

the Commissioner determines to be satisfactory for the number of units to be included in the project insured by the Commissioner and to effect a corresponding reduction in the total consideration to be paid the Government. Failure of the Lessee to complete said improvements in whole or in part shall not be grounds for termination of this lease, except as provided in Condition 2 hereof.

[fols. 285-288] The land hereby leased is described as follows: A certain tract of land situated in the County of Sarpy, State of Nebraska, more particularly described as follows:

Description of Property Omitted in Printing.

[fol. 289] This lease is granted subject to the following provisions and conditions:

1. That the Lessee shall pay to the Government rental in the amount of One Hundred ($100.00) Dollars per annum payable annually in advance. Compensation will be made payable to the Treasurer of the United States and forwarded by the Lessee direct to: Commanding Officer, Offutt Air Force Base, Omaha, Nebraska.

2. That an application for mortgage insurance under Title VIII of the National Housing Act, as amended, for the said housing project, including Exhibits required therein shall be submitted to the Federal Housing Administration within forty-five (45) days from the effective date of this lease. In the event that the Commissioner does not issue a commitment to insure pursuant to such application; or in the event that a commitment to insure is issued and the mortgage pursuant thereto is not initially endorsed for insurance within ninety (90) days from the date of such issuance or any extensions thereof, the Government, at its option, may effect a termination of this lease and all the rights of the Lessee thereunder; and the Government may at once re-enter the leased premises and repossess itself thereof and remove all persons therefrom or may resort to any summary action to recover same; provided, however, that written notice of intention to so terminate this lease shall be given the Lessee, the Commissioner and the proposed mortgage, if any, at least fifteen (15) days prior to said termination.

3. (a) That the Lessee shall lease all units of the housing project to such military and civilian personnel of the Army, Navy, Marine Corps or Air Force (including Government Contractors' employees) assigned to duty at the military installation or in the area where such property is located, as are designated by the Commanding Officer, Offutt Air Force Base, Omaha, Nebraska; provided, however, that in the event the said Commanding Officer fails to designate military or civilian personnel of the Army, Navy, Marine Corps or Air Force (including Government contractors' employees) to whom the unit or units shall be leased, within thirty (30) days after receipt of written notice from the Lessee that such unit or units are available for lease, or such designated personnel fails to execute a lease within said thirty (30) day perior or fails to indicate in writing to the Lessee within said thirty (30) day period that he will execute the lease, or refuses to execute the lease within five (5) days after presentation by the Lessee for execution, if such lease is presented for execution subsequent to the expiration of said thirty (30) day period, the Lessee may lease such unit or units to persons other than said military or civilian personnel. Any lease executed by the Lessee will provide that rental for the unit accepted by such designated personnel shall accrue to the Lessee from the date of occupancy or from the expiration date of the said thirty (30) day period, whichever is first. The execution of a lease or written notice by such designated personnel that he will execute a lease shall be deemed to be an acceptance of the unit.

(b) That any lease granted to said military or civilian personnel shall be for a term of one (1) year and shall provide for automatic renewals thereafter from month to month until said military or civilian personnel given thirty (30) days written notice of relinquishment. Any such lease shall also provide that the tenant shall, upon receipt of orders permanently transferring him to another military station or in the event of tenant's separation from military service or civilian employment, terminate his tenancy by giving thirty (30) days written notice of termination of tenancy.

[fol. 290] That in the event any unit is leased to persons other than said military or civilian personnel, such lease shall be limited to a term of one (1) year and shall provide for automatic renewals thereafter from month to month until the said Commanding Officer exercises his right to designate a tenant and gives written notice to the Lessee as hereinafter provided. Lessee shall notify the said Commanding Officer at least sixty-five (65) days prior to the expiration or termination of any firm one (1) year lease so granted, and the said Commanding Officer shall thereafter, at any time, have the right to designate a tenant for any unit on which said one (1) year lease shall have expired or terminated, by giving to Lessee notice of such designation at least thirty-five (35) days prior to the expiration or termination of any one (1) year lease, or at least five (5) days prior to the beginning of any automatically renewable monthly term, the former to be effective at the end of such firm term period, and the latter at the end of the first monthly term running in full after the giving of such notice. If such designated tenant fails to execute a lease on or before the effective termination date of the lease for said unit or fails to indicate in writing to the Lessee on or before the effective termination date of the lease for said unit that he will execute the lease or refuses to execute the lease within five (5) days after presentation of a lease by the Lessee for execution, if such lease is presented for execution subsequent to the effective termination date of the lease for said unit, the Lessee may lease such unit to persons other than said designated tenant. Rental for the unit accepted by such designated tenant shall accrue to the Lessee from the date of occupancy or the effective termination date of the lease for said unit, if the unit has been made available for occupancy by the Lessee, whichever is first. If the unit has not been made available for occupancy by the Lessee upon the effective termination date of the lease for said unit, rental shall accrue to the Lessee from the date of occupancy or the expiration date of a five (5) day written notice by the Lessee to the designated tenant that the unit is available for occupancy, whichever is first. The execution of a lease or written notice by such designated personnel that he will execute a lease shall be deemed to be an

acceptance of the unit. Any lease granted pursuant to this condition 3 (c) to persons other than said military or civilian personnel shall reserve unto the Lessee the right to revoke the lease in the event there is a declaration of national emergency by the President or Congress of the United States and the lessee hereby agrees that it will during the period of any such national emergency revoke any and/or all such leases at the written request of the said Commanding Officer. Nothing contained in this paragraph shall be construed as contemplating the eviction of tenants in violation or contravention of Federal, State, or local law in restriction of such eviction, in the event, and in the event, only that such law is applicable to housing units erected on the said military installation.

4. That if at any time during the term of this lease there is no mortgage insured under the National Housing Act covering the interest of the Lessee and the Leased premises are not under the control of the Commissioner, the rental rates for leases granted in accordance with Condition 3 shall be such rates as are agreed upon from time to time by the said Commanding Officer and the Lessee, provided, however, that, in case this lease shall be acquired by the Commissioner and subsequently assigned or sold, the rents shall not be reduced below the schedule of rents then in effect without the consent of the then owner and holder of the leasehold interest.

[fol. 291] 5. That the Lessee shall neither transfer nor assign this lease without the prior written approval of the Secretary of the Air Force. This provision shall not apply to the leasing of the individual units to tenants or to the placing of Deeds of Trust, mortgages or similar liens on the leased premises or to voluntary or involuntary transfers in pursuance of such security instruments or to any transfer in pursuance of, or subsequent to, any transfer of the leased premises under the contract of mortgage insurance.

6. That the Lessee shall at all times exercise due diligence in the protection of the leased premises against damage or destruction by fire or other causes.

7. That the Lessee shall comply with all laws, ordinances, and regulations, that are applicable to the leased area, with regard to construction, sanitation, licenses or permits to do business, and other matters.

8. That the Lessee shall pay to the proper authority, when and as the same become due and payable, all taxes, assessments, and similar charges which, at any time during the term of this lease may be taxed, assessed or imposed upon the Government or upon the Lessee with respect to or upon the leased premises. In the event any taxes, assessments, or similar charges are imposed with the consent of the Congress of the United States upon the property owned by the Government and included in this lease (as opposed to the leasehold interest of the Lessee therein), this lease shall be renegotiated so as to accomplish an equitable reduction in the rental provided above, which shall not be greater than the difference between the Amount of such taxes, assessments, or similar charges and the amount of any taxes, assessments or similar charges which were imposed upon such Lessee with respect to his leasehold interest in the leased premises prior to the granting of such consent by the Congress of the United States; provided, however, that the amount of such reduction in rental shall in no event be more than 50 percent of the rental provided above; provided, further, that in the event that the parties hereto are unable to agree, within ninety (90) days from the date of the imposition of such taxes, assessments, or similar charges, upon an equitable reduction in rental, such failure to agree shall be considered to be a question of fact within the meaning of the clause of this lease relating to disputes.

9. That it is agreed that the Government will furnish upon a reimburseable basis the following services to the Lessee's housing project during the term of this lease but in no case beyond the period for which the facilities from which such services are to be furnished remain under the control of the Department of the Air Force, provided that nothing herein shall bind the Government to expand its existing facilities or to furnish any services which it purchases from private sources unless it is determined that such services cannot reasonably be furnished from private sources direct to the Lessee. The Government shall not be responsible for any damages as a result of temporary failure to provide the services hereinafter set forth:

a. Fire protection.

b. The Air Force intends to prescribe and maintain the

same safety and security for the housing project as for the rest of the Base.

[fol. 292] 10. That the Lessee shall have the right to permit public utility companies to extend water, sewer, gas, telephone and electric power lines on the leased premises for the exclusive purpose of furnishing utilities to the housing project, subject to all provisions and conditions of this lease.

11. That upon the expiration of this lease, or earlier termination, all improvements made upon the leased premises shall remain the property of the Government without compensation, provided that the provisions of this Condition shall not apply to facilities erected by utility companies on the leased premises for the purpose of furnishing utility services to the housing project. The buildings and improvements erected by the Lessee, constituting the aforesaid housing project, shall be and become, as completed, real estate and part of the leased land, and public buildings of the United States, leased to Lessee for the purpose of serving the governmental and public purpose of providing military housing in accordance with Title VIII of the National Housing Act, and in accordance with the provisions of this lease, and subject to the term of this lease, and any renewal or extension of this lease.

12. That the use and occupation of the leased premises shall be subject to such rules and regulations as the said Commanding Officer may from time to time reasonably prescribe for military requirements for safety and security purposes, consistent with the use of the leased premises for housing.

13. That the Lesse shall, at any time after there is no Federal Housing Administration insured mortgage on the property and the leased premises are not under the control of the Commissioner, adhere to such standards of maintenance and repair of the housing project as shall be mutually agreed upon between the Lessee and the Commanding Officer; that the Lessee shall observe and perform in accordance with all the laws, ordinances, rules and regulations relating to health and sanitation for the time being applicable to the said leased premises; and will indemnify and save harmless the Government against all actions, suits,

claims and damages by whomsoever brought or made by reason of the failure to keep said buildings and improvements in good order, condition and repair, or by reason of the non-observance of or non-performance in accordance with the said laws, ordinances, rules and regulations, or of this lease; and that the Lessee will permit the Government, at all reasonable times during the said period, to enter the said premises and examine the state of repair and condition thereof and will commence forthwith, after notice has been given by the Government, such work as may be necessary to return the property to a condition conforming to the said standard of maintenance and repair.

14. That the right is hereby reserved to the Government, its officers, agents and employees to enter upon the leased premises at any time for the purpose of inspection and when otherwise deemed necessary for the protection of the interests of the Government, provided that if such representatives of the Government desire to enter the improvements placed upon said premises by the Lessee the opportunity shall be afforded to the Lessee's representatives to accompany said representative of the Government. The Lessee shall have no claim of any character on account of any such inspection against the Government or any officer, agent or employee thereof.

[fol. 2?] 15. The Government shall not be responsible for any damage to property or injury to person arising out of the use or occupancy of the leased premises by the Lessee or any sublessee, and the Lessee shall indemnify and save the Government harmless from any, and all claims for any such damage or injuries, provided, that the provisions of this condition 15 shall not apply to such claims as are cognizable under the Federal Tort Claims Act, as amended.

16. That any property of the United States damaged or destroyed by the Lessee incident to the Lessee's use and occupation of the leased premises, shall be promptly repaired or replaced by the Lessee to the satisfaction of the said Commanding Officer, or in lieu of such repair or replacement the Lessee shall, if so required by the said Commanding Officer, pay to the United States an amount sufficient to compensate for the loss sustained by the United States by reason of damage to or destruction of Government property.

17. That the Government may terminate this lease at any time by giving sixty (60) days written notice through the Secretary of the Air Force by registered mail, to the Lessee and known security holders in the event that rental is not paid in accordance with Condition 1 of this lease after thirty (30) days written notice has been given by the said Secretary of the Air Force, by registered mail, at the last post office address on file, to the Lessee and known security holders. Security holders or any Government agency directly or indirectly interested may make payments of rental direct to the Government. It and so long as the leasehold estate of the Lessee is encumbered by a mortgage, the Government agrees to give the holder of such mortgage (and if such mortgage is insured under the National Housing Act, to the Commissioner) notice of any default, simultaneously giving such notice to the Lessee, and the holder of any such mortgage and/or the Commissioner shall have the right within the period limited by any such notice and for an additional period of ninety (90) days thereafter, to take such action or to make such payment as may be necessary or appropriate to cure any such default. Anything to the contrary notwithstanding, so long as there is upon the Lessee's interest under this lease a mortgage insured by or held by the Commissioner or so long as the lease of the leased premises is in the said Commissioner, the Government shall not, without the written consent of the Commissioner, exercise its right to terminate this lease for any cause whatsoever, within a period of nine (9) months from the date the Commissioner shall have been given written notice of the existence of defaults. Within said nine (9) months period, the Commissioner may reinstate said lease by causing any and all existing defaults to be cured or may exercise the right granted the mortgagee under this paragraph. All notices, demands and requests which may be or are required to be given by the Government to the Lessee, or to any mortgagee or mortgagees of the leasehold estate, or to the Commissioner, if any such mortgage or mortgages are insured under the National Housing Act, shall be sent by the United States registered mail, postage prepaid, addressed to the Lessee, mortgagee or mortgagees of the leased premises and/or the Commissioner at such place or places

as such Lessee, mortgagee or mortgagees and/or the Commissioner may from time to time designate in a written notice to the Government.

18. That except as otherwise specifically provided in this lease, all disputes concerning questions of fact or establishment of rental rates or standards of maintenance and repair after there is no mortgage held or insured by the Federal Housing Administration on the property and the leased premises are not under the control of the Commissioner, which may arise under this lease, and which are not disposed of by mutual agreement, shall be decided by the said Commanding Officer, who shall reduce his decision to writ- [fol. 294] ing and mail a copy thereof to the Lessee at its address shown herein. Within thirty (30) days from said mailing the Lessee may appeal to the Secretary of the Air Force, whose written decision or that of his designated representative or representatives or board, shall be final and conclusive upon the parties hereto. Pending decision of a dispute hereunder, the Lessee shall proceed with the performance of this lease and in accordance with the Commanding Officer's decision. The provisions of this paragraph shall not be deemed to limit the provisions of Condition 4 of this lease with respect to rents.

19. Relating to the Reservation of Uranium, etc., deposits (omitted in printing).

20. That the Lessee, during the term of this lease, will, at its own cost and expense, insure and keep insured against fire the buildings that may hereafter be erected on the leased premises in an amount to be determined by the Government, payable both to the Lessee and any security holder, jointly as their respective interests may appear. Such insurance shall state that the leased premises are held under a seventy-five (75) year lease. In the event of a partial loss or damage to the improvements on the leased premises by fire or otherwise, the Lessee shall within a reasonable time thereafter restore the improvements to their former condition. In the event of a complete destruction of any one or more of the buildings erected on said premises the Government and the Lessee shall have sixty (60) days in which to determine whether the premises shall be rebuilt. A determination by either party that it does not desire to

rebuilt the premises shall be binding on both parties of this lease, in which event this lease may be renegotiated to reduce the area included therein with an appropriate reduction in rental to be paid by Lessee. This Condition 20 shall be inoperative so long as the interests of the Lessee are covered by a mortgage insured or held by the Commissioner or the leased premises are under the control of the Commissioner.

[fol. 295] 21. That it is further covenanted and agreed between the Government and the Lessee that the covenants and agreements herein contained shall bind and inure to the benefit of the Government, its assigns, and the Lessee, its successors and assigns.

22. That no member of or delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this lease or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this lease if made with a corporation for its general benefit.

23. That all notices to be given pursuant to this lease shall be addressed, if to the Lessee, to Offutt Housing Company, 918 City National Bank Bldg., Omaha, Nebraska, if to the Government, to Commanding Officer, Offutt Air Force Base, Omaha, Nebraska, or as may from time to time otherwise be directed by the parties. All notices to be given the Commissioner or the Federal Housing Administration pursuant to the terms of this lease shall be sent to the director of the insuring office of the Federal Housing Administration where the application for mortgage insurance is to be or is filed. Notice shall be deemed to have been duly given if and when inclosed in a properly sealed envelope or wrapper, addressed as aforesaid, marked as registered mail, with registry fee prepaid, and deposited postage prepaid in a post office or branch post office regularly maintained by the Government.

24. That if more than one Lessee is named in this lease the obligation of said Lessees herein contained shall be joint and several obligations.

25. That, except as otherwise specifically provided, the terms Commanding Officer and Secretary of the Air Force, as used herein, shall include their duly appointed representatives, as well as their successors and the duly appointed representatives of such successors.

In Witness Whereof I, the Assistant Secretary of the Air Force, have hereunto set my hand and affixed the seal of the Department of the Air Force, this 18th day of January, 1951.

(S.) Harold C. Stuart, Assistant Secretary of the Air Force.

Witness: (S.) Marian J. Cardell, Frances Stowe.

COMMONWEALTH OF VIRGINIA,
County of Arlington, ss:

This day before me, a Notary Public, personally appeared Harold C. Stuart to me well known and well known to me to be the individual described in and who executed the foregoing instrument, and acknowledged before me that he executed the same for the purposes therein expressed, as Assistant Secretary of the Air Force.

Witness my hand and official seal this 18th day of January 1951.

(S.) Bertie M. Poston, Notary Public.

My commission expires April 9, 1951.
Contract No. AF 25(010)-210

[fols. 296-297] Offutt Housing Company, has caused this lease to be executed by Carl C. Wilson, its President, its corporate seal to be attached, and attested by its Secretary on this 18th day of January, 1951.

Offutt Housing Company. (S.) by Carl C. Wilson, President.

Attest: (S.) Robert J. Wilson, Secretary.

Witness: (S.) J. L. Mossman, Jr., 3612 N. 49 Omaha, Nebraska. (S.) Jules Hendricks, 2401 Jackson St., Bellevue, Nebraska.

STATE OF NEBRASKA,
Douglas County, ss:

On this 18th day of January, 1951, before me, the undersigned, a Notary Public in and for said County, personally came Carl C. Wilson, President of the Offutt Housing Com-

pany, to me personally known to be the President and the identical person whose name is affixed to the above conveyance, and acknowledged the execution thereof to be his voluntary act and deed as such officer and the voluntary act and deed of the said Offutt Housing Company, and that the Corporate seal of the said Corporation was thereto affixed by its authority.

Witness my hand and Notarial Seal at Omaha, Nebraska in said county the day and year last above written.

My commission expires the 7th day of June 1953.

(S.) Katherine M. Elster, Notary Public.

Certificate

I, Robert J. Wilson, certify that I am the Secretary of the corporation named as Lessee herein; that Carl C. Wilson, who signed this lease on behalf of the Lessee, was then President of said corporation; that said lease was duly signed for me and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

(S.) Robert J. Wilson, Contract No. AF25(010)-210.

(Here follow 3 photolithographs, side folios 298, 299-300, 301-303)

144A

Exhibit 5

BUSINESS 1952

Schedule No.

B. BUSINESS AND PROFESSIONAL SCHEDULE

READ INSTRUCTIONS ON REVERSE SIDE CAREFULLY

TRADE NAME OF BUSINESS: Offutt [illegible] Co. Laundry

OWNER'S NAME: Offutt Housing Co.

BUSINESS ADDRESS: 711 city nat'l Bank

IF IN VILLAGE WRITE YES

PRECINCT OR TOWN: Lower Platte CITY OR VILLAGE: Bellevue

CORPORATION / PARTNERSHIP / INDIVIDUAL

PART OF SECTION | SEC NO | TWP | RNG

NE¼ | 2 | 13 | 13

B. For Assessor's Use Only

Recap. No.

Road Dist. No.

School Dist. No.

Fire Dist. No.

Tax Dist. No.

C. Type of Business (See Classification at right)

D. 1951 return made in: State Co. Precinct School Dist.

E. List below Motor Vehicles owned, used in Business

YEAR	MAKE	BODY TYPE	FACTORY RATED CAP.	LICENSED YES	LICENSED NO	LICENSE NO.
19						
19						
19						
19						
19						

F. FURNITURE & FIXTURES—TOOLS & EQUIPMENT

COLUMN ONE	No.	Actual Value
General		
1. Adding Machines-Calculators	1	50
2. Air Conditioning Units		
3. Bookkeeping Mach. & Inter. Comm. Sys.		
4. Cameras and Kodaks		
5. Cash Registers	1	50
6. Chairs and Tables	10	30
7. Counters and Show Cases	2	40
8. Desks		
9. Desk and Floor Lamps		
10. Display Units and Shelving	2	20
11. Files		
12. Ice Cream Mach., Coolers		
13. Music Boxes		
14. Neon Signs and Clocks		
15. Penny Weighing Mach.		
16. Pinball Mach., Shuffleboards		
17. Radios	1	15
18. Safes, Storage Cabinets		
19. Scales		
20. Signs and Sign Panels		
21. Television Sets		
22. Tools, All Kinds		
23. Typewriters and Mimeographs	1	35
24. Vending Machines		
Professional		
1. Barber Chairs and Tools		
2. Book Cases-Magazine Stands		
3. Burial Equipment		
4. Comptometers		
5. Davenports and Settees		
6. Dental Chairs and Tools		
7. Dictaphones and Teletypes		
8. Hair Dryers		
9. Hospital Beds		
10. Operating Tables		
11. Permanent Wave Machines		
12. Professional Libraries		
13. Sun Lamps-Sterilizers		
14. Surgical Instruments		
15. X-Ray Equipment		
16. Other Prof. Equipment		
Retail Stores		
1. Cutters and Slicers		
2. Refrigeration Units		
3. Refrigerated Show Cases		
4. Refrig. Lockers & Equipment		
5. Shopping Buggies		
Lodging, Refreshments		
1. Back Bars and Mirrors		
2. Beverage		

COLUMN TWO — BALANCE CARRIED FWD	No.	Actual Value
		205
6. Dishes-Silverware-Utensils		
7. Mixers-Toasters-Coffee Mkrs.		
8. Mot. Pic. Proj., Cameras, Seats		
9. Pool & Billiard Tables & Equip.		
10. Popcorn & Vending Machines		
11. Soda Fountain Equipment		
12. Theatre Screens, Sound Panels		
Petroleum Sales—Motor And Implement Service		
1. Air Compressors		
2. Brake Lining Mach. & Equip		
3. Gasoline Pumps		
4. Hoists and Grease Racks		
5. Jacks		
6. Lubesters and Dispensers		
7. Lubrication Equipment		
8. Motors, All Kinds		
9. Parts Bins		
10. Tanks No. Cap.		
11. Valve Grinders and Lathes		
12. Vulcanizing and Tire Equip.		
13. Welding Equipment		
14. Wheel Alignment Equip.		
Wholesale-Industrial Construction, Etc.		
1. Bottle Washers		
2. Bottling Machines		
3. Bulldozers-LeTourneaus		
4. Canning Machines		
5. Can Washers-Cream Testers		
6. Cement Mixers		
7. Churns-Pasteurizers-Homogenizers		
8. Conveyors-Elevators		
9. Dehydrating Machines		
10. Diesel Motors		
11. Dragline-Graders		
12. Drills and Dies		
13. Grain Dryers		
14. Grinders, Milling Equip.		
15. Incubators-Brooders		
16. Land and Ditch Scoops		
17. Lowboys		
18. Machine Saws-Lathes		
19. Packers-Airhammers		
20. Planing Equip. Sanders		
21. Tractors		
Miscellaneous and Specialized		
1. Household Appliances		6945
2.		
3.		
4.		
5.		

J. CLASSIFIED BUSINESS

No.	Classified Business	Actual Value
72	Advertising Agencies	
73	Airports	
74	Alfalfa Mills	
75	Apartment Houses	8256
76	Attorneys	
77	Bakeries	
78	Barber & Beauty Shops	
79	Book & Magazine Stores	
80	Bowling Alleys	
81	Broadcasting Stations	
82	Cabin Camps & Motels	
83	Cafés & Confectioneries	
84	Carpenters & Contractors	
85	Cleaners & Laundries	
86	Clothing & Dry Goods Stores	
87	Coin Machine Operators	
88	Cold Strge & Locker Plants	
89	Creameries & Dairies	
90	Dentists & Physicians	
91	Department Stores	
92	Drug Stores	
93	Earth Movers	
94	Florists & Greenhouses	
95	Funeral Homes	
96	Furniture Stores	
97	Garages, Tire & Rep'g Shops	
98	Grain Dealers	
99	Grocery & Meat Mkts.	
100	Hardware & Appl'ce Stores	
101	Hatcheries	
102	Hospitals	
103	Hotels & Rooming House	
104	Implement Dealers	
105	Jewelry Stores	
106	Liquor Stores	
107	Lumber & Coal Dealers	
108	Machine Shops	
109	Manufacturers	
110	Motion Picture Dist'rs.	
111	Motor Vehicle Dealers	
112	Nurseries	
113	Offices, Real Est., Ins., etc.	
114	Oil Dealers Retail	
115	Oil Distributors	
116	Optometrists	
117	Packing & Process'g Plants	
118	Photography Shops	
119	Plmbg. & Electrical Contr's	
120	Pool Halls & Taverns	
121	Post Office Fixtures	

FORM AUTHORIZED BY STATE TAX COMMISSIONER
OMAHA PRINTING COMPANY

1441

SHARES OF STOCK IN CORPORATIONS—Capital Stock of Which is Not Assessed or Taxed in This State			
NAME OF CORPORATION	Number of Shares	Value Per Share	Total Value (List Dollars Only)

Have you made a Business and Professional Schedule other than this one in 1952?

Answer _____ If answer is yes, state where _____

INTERROGATORIES

77-1231 of the revenue law provides that the person required to list intangible and tangible property shall answer in writing, over his signature and under oath, the following interrogatories:

Interrogatory 1: Are you, or were you, on March 10 of the present year, the excutor of the last will, or the administrator of the estate of any deceased person, or the guardian of the estate of any infant or person of unsound mind, or the trustee of the property of any person, or the receiver of any corporation, association or firm, or the agent, attorney or banker investing, loaning or otherwise controlling the money or the property of any person or the president or accounting officer of any corporation, or a partner, consignee, or pawnbroker? If yes, designate for whom you were then, or now are, acting in such representative or fiduciary capacity; and if you were then, or now are, acting under the authority of any particular court, name the court, and also state to what court you report.

Answer.....

Interrogatory 2: Have you, since March 10 of last year, either personally or through the agency of others, caused all or any part of your taxable property or other property to be temporarily converted, either by sale, loan, exchange or in any other manner, into bonds or other securities of the United States not taxable, or any other property not taxable, with the intention to pay back, return, exchange or dispose of such property after you have made out your tax statement? Or did you on or before March 10 of the present year, and before you saw this interrogatory, pay back, return, exchange or dispose of any such property for the purpose aforesaid?

Answer.....

Interrogatory 3: If you have converted any of your money or property, or money or property of any other person, as inquired of you, then state when the same was so converted or invested, and the time and amount of value therof.

Answer.....

Interrogatory 4: Have you, at any time since March 10 in the preceding year, withdrawn from any bank any money deposited therein for the purpose of converting the same into some form of nontaxable property, or for the purpose of sending the same out of the state, or transferring the same to some other person or persons, with the intent or purpose of evading the payment of tax on the same?

Answer.....

GENERAL INSTRUCTIONS

1. According to the provisions of Section 77-1229, R.R.S. Nebr. 1943, you are required to make out a true statement, list or schedule of all intangible and tangible personal property subject to taxation which is held by you as owner, lessee or occupant in control thereof, or as guardian, husband, parent, trustee, executor, administrator, receiver, accounting officer, partner, agent or other representative officer. You are further required to verify said statement, list or schedule under oath before the county assessor, his assistants, a notary public or some other person authorized by law to take acknowledgments and return same to the county assessor or his assistants on or before April 20th. The law states the word "None" must be written opposite each item where no property of that kind is owned. Return intangible and tangible personal property of wife and children on this schedule unless separate schedules are filed.

2. While property is listed for taxation as of March 10, nevertheless Section 77-1211, R.R.S. Nebr. 1943, provides for the listing of property brought into the State or county after the tenth day of March and prior to the first day of July.

3. Section 77-412, R.R.S. Nebr. 1943, empowers the county assessor to add to the return of any taxpayer items of property he may find have been omitted and to change the valuation of any item of property in the return to what he deems to be its actual value. Notice of such change shall be given to the taxpayer or his agent by postcard to the address of the taxpayer shown on the return.

4. Section 77-413, R.R.S. Nebr. 1943, provides that any personal property either tangible or intangible which was not returned for taxation for any or all of the three previous years shall be taxed at the rate of levies for the year in which such property was omitted, and there shall be added interest at the rate of 7 percent plus a penalty of 10 percent of the tax on tangible property and 50 percent of the tax on intangible property.

5. The County Board of Equalization, which is composed of the County Board, the County Assessor, and the County Clerk, meets on the first Monday in May and continues

1440

Exhibit 6

A. BUSINESS AND PROFESSIONAL SCHEDULE — SEE INSTRUCTIONS ON REVERSE SIDE CAREFULLY

B. For Assessor's Use Only

BUSINESS Schedule No. 1952 1953

TRADE NAME OF BUSINESS: Offutt Housing Company
OWNER'S NAME: Offutt Housing Company
BUSINESS ADDRESS: 618 City Nat'l Bank Bldg.
PRECINCT OR TOWN: Dellende Blvd.
IF IN VILLAGE WRITE YES
PART OF SECTION | SEC. NO. | TWP. | RNG.: 25 | 12 | 13

CORPORATION ☐ PARTNERSHIP ☐ INDIVIDUAL ☐

Recap. No. ____ Road Dist. No. ____ School Dist. No. ____ Fire Dist. No. ____ Tax Dist. No. ____

C. Type of Business – (See Classification at right)

D. 1951 return made in: State ____ Co. ____ Precinct ____ School Dist. ____

E. List below Motor Vehicles owned, used in Business

YEAR	MAKE	BODY TYPE	FACTORY RATED CAP	LICENSED YES	LICENSED NO	LICENSE NO.
19						
19						
19						
19						
19						

F. FURNITURE & FIXTURES—TOOLS & EQUIPMENT

COLUMN ONE	No.	Actual Value
General		
1. Adding Machines-Calculators	1	40
2. Air Conditioning Units		
3. Bookkeeping Mach. & Inter-Comm. Sys.		
4. Cameras and Kodaks		
5. Cash Registers		
6. Chairs and Tables	16	78
7. Counters and Show Cases		
8. Desks		
9. Desk and Floor Lamps		
10. Display Units and Shelving		
11. Files	2	20
12. Ice Cream Mach., Coolers		
13. Music Boxes		
14. Neon Signs and Clocks		
15. Penny Weighing Mach.		
16. Pinball Mach., Shuffleboards		
17. Radios	1	20
18. Safes, Storage Cabinets		
19. Scales		
20. Signs and Sign Panels		
21. Television Sets		
22. Tools...All Kinds	1	30
23. Typewriters and Mimeographs		
24. Vending Machines		
Professional		
1. Barber Chairs and Tools		
2. Book Cases-Magazine Stands		
3. Burial Equipment		
4. Comptometers		
5. Davenports and Settees		
6. Dental Chairs and Tools		
7. Dictaphones and Teletypes		
8. Hair Dryers		
9. Hospital Beds		
10. Operating Tables		
11. Permanent Wave Machines		
12. Professional Libraries		
13. Sun-Lamps-Sterilizers		
14. Surgical Instruments		
15. X-Ray Equipment		
16. Other Prof. Equipment		
Retail Stores		
1. Cutters and Slicers		
2. Refrigeration Units		
3. Refrigerated Show Cases		
4. Refrig. Lockers & Equipment		
5. Shopping Buggies		
Lodging, Refreshment, Recreation		
1. Back Bars and Mirrors		

COLUMN TWO	No.	Actual Value
BALANCE CARRIED FWD		170
6. Dishes-Silverware-Utensils		
7. Mixers-Toasters-Coffee Mkrs.		
8. Mot. Pic. Proj., Cameras, Seats		
9. Pool & Billiard Tables & Equip.		
10. Popcorn & Vending Machines		
11. Soda Fountain Equipment		
12. Theatre Screens, Sound Panels		
Petroleum Sales– Motor And Implement Service		
1. Air Compressors		
2. Brake Lining Mach. & Equip		
3. Gasoline Pumps		
4. Hoists and Grease Racks		
5. Jacks		
6. Lubesters and Dispensers		
7. Lubrication Equipment		
8. Motors, All Kinds		
9. Parts Bins		
10. Tanks No. Cap.		
11. Valve Grinders and Lathes		
12. Vulcanizing and Tire Equip.		
13. Welding Equipment		
14. Wheel Alignment Equip.		
Wholesale-Industrial Construction, Etc.		
1. Bottle Washers		
2. Bottling Machines		
3. Bulldozers-LeTourneaus		
4. Canning Machines		
5. Can Washers-Cream Testers		
6. Cement Mixers		
7. Churns-Past'riars-Homog'izrs		
8. Conveyors-Elevators		
9. Dehydrating Machines		
10. Diesel Motors		
11. Dynamos-Grinders		
12. Drills and Dies		
13. Grain Dryers		
14. Grinders, Milling Equip.		
15. Incubators-Brooders		
16. Land Rollers-Scoops		
17. Lowboys		
18. Machine Saws-Lathes		
19. Packers-Airhammers		
20. Planing Equip. Sanders		
21. Tractors		
Miscellaneous and Specialized		
1. Household appliances		1084 10
2.		
3.		
4.		

I. CLASSIFIED BUSINESS	No.	Actual Value	
72. Advertising Agencies			72
73. Airports			73
74. Alfalfa Mills			74
75. Apartment Houses		27750	75
76. Attorneys			76
77. Bakeries			77
78. Barber & Beauty Shops			78
79. Book & Magazine Stores			79
80. Bowling Alleys			80
81. Broadcasting Stations			81
82. Cabin Camps & Motels			82
83. Cafes & Confectioneries			83
84. Carpenters & Contractors			84
85. Cleaners & Laundries			85
86. Clothing & DryGoodsStores			86
87. Coin Machine Operators			87
88. Cold Stor'e & Locker Plants			88
89. Creameries & Dairies			89
90. Dentists & Physicians			90
91. Department Stores			91
92. Drug Stores			92
93. Earth Movers			93
94. Florists & Greenhouses			94
95. Funeral Homes			95
96. Furniture Stores			96
97. Garages, Tire&Rep'rShops			97
98. Grain Dealers			98
99. Grocery & Meat Mkts.			99
100. Hardware&Appl'ceStores			100
101. Hatcheries			101
102. Hospitals			102
103. Hotels & Rooming House			103
104. Implement Dealers			104
105. Jewelry Stores			105
106. Liquor Stores			106
107. Lumber & Coal Dealers			107
108. Machine Shops			108
109. Manufacturers			109
110. Motion Picture Dist'rs.			110
111. Motor Vehicle Dealers			111
112. Nurseries			112
113. Offices, Real Est., Ins., etc.			113
114. Oil Dealers Retail			114
115. Oil Distributors			115
116. Optometrists			116
117. Packing & Process'g Plants			117
118. Photography Shops			118
119. Plmbg.&ElectricalContr's			119
120. Pool Halls & Taverns			120

FORM AUTHORIZED BY STATE TAX COMMISSIONER — OMAHA PRINTING COMPANY

[fols. 304-305] EXHIBIT 7

Office of County Treasurer

Papillion, Sarpy County, Nebraska

Robert M. Eby, Treasurer
Lois Jean Derby, Deputy
Edna J. Runge, Chief Clerk

April 13, 1953.

Manufacturer's Trust Co.
45 Beaver St.
New York, N. Y.

Attention: Real Estate & Mtg. Dept.

Re: Project Offutt Housing Co.

GENTLEMEN:

The $10,783.45 tax on the above captioned property is now one-half delinquent since December 1, 1952, drawing 7% interest.

The other half will be delinquent on July 1, 1953.

On August 1st, 1953, a Distress Warrant will be issued by this office to the Sheriff's office of this county, and it is mandatory that he collect this warrant or attach any property this firm may have in the county if not collected.

Distress warrant fee will be added, also mileage.

This tax was due and payable on November 1, 1952.

Sincerely, Robert M. Eby, Co. Treasurer Sarpy County.

(Here follows 1 photolithograph, side fol. 306)

I, Frank Marsh, Secretary of State of the

State of Nebraska do hereby certify that

the attached is a true and correct copy of the Articles of Incorporation of OFFUTT HOUSING COMPANY of Omaha, Nebraska, as filed in this office on December 22nd, 1950, and recorded in book 174, page 446, Miscellaneous Incorporations.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State of Nebraska. Done at Lincoln this 22nd day of December in the year of our Lord, one thousand nine hundred and fifty

Frank Marsh
Secretary of State

Deputy

832

STATE OF NEBRASKA

Department of State

I, Frank Marsh, Secretary of State of the State of Nebraska do hereby certify that

the attached is a true and correct copy of the Articles of Incorporation of OFFUTT HOUSING COMPANY of Omaha, Nebraska, as filed in this office on December 22nd, 1950, and recorded in book 174, page 446, Miscellaneous Incorporations.

FORM AUTHORIZED BY STATE TAX COMMISSIONER — MIDLAND PRINTING COMPANY

14. Neon Signs and Clocks			
15. Penny Weighing Mach.			
16. Pinball Mach., Shuffleboards			
17. Radios	1	15	
18. Safes, Storage Cabinets			
19. Scales			
20. Signs and Sign Panels			
21. Television Sets			
22. Tools, All Kinds			
23. Typewriters and Mimeographs	1	35	
24. Vending Machines			
Professional			
1. Barber Chairs and Tools			
2. Book Cases-Magazine Stands			
3. Burial Equipment			
4. Comptometers			
5. Davenports and Settees			
6. Dental Chairs and Tools			
7. Dictaphones and Teletypes			
8. Hair Dryers			
9. Hospital Beds			
10. Operating Tables			
11. Permanent Wave Machines			
12. Professional Libraries			
13. Sun Lamps-Sterilizers			
14. Surgical Instruments			
15. X-Ray Equipment			
16. Other Prof. Equipment			
Retail Stores			
1. Cutters and Slicers			
2. Refrigeration Units			
3. Refrigerated Show Cases			
4. Refrig. Lockers'R Equipment			
5. Shopping Buggies			
Lodging, Refreshment and Service			
1. Back Bars and Mirrors			
2. Beverage Coolers			
3. Booths and Tables			
4. Bowling Alleys and Equip.			
5. Carpets, Rugs and Draperies			
Carry This Total Forward	20	5	

7. Lubrication Equipment			
8. Motors, All Kinds			
9. Parts Bins			
10. Tanks No. Cap.			
11. Valve Grinders and Lathes			
12. Vulcanizing and Tire Equip.			
13. Welding Equipment			
14. Wheel Alignment Equip.			
Wholesale-Industrial Construction, Etc.			
1. Bottle Washers			
2. Bottling Machines			
3. Bulldozers-LeTourneaus			
4. Canning Machines			
5. Can Washers-Cream Testers			
6. Cement Mixers			
7. Churns-Pasteurizers-Homogenizers			
8. Conveyors-Elevators			
9. Dehydrating Machines			
10. Diesel Motors			
11. Dragglines-Graders			
12. Drills and Dies			
13. Grain Dryers			
14. Grinders, Milling Equip.			
15. Incubators-Brooders			
16. Land Rollers-Scoops			
17. Lowboys			
18. Machine Saws-Lathes			
19. Packers-Airhammers			
20. Planing Equip. Sanders			
21. Tractors			
Miscellaneous and Specialized			
1. Household Appliances		6 9 6 9	
2.			
3.			
4.			
5.			
6.			
7.			
8.			
9.			

96. Furniture Stores			96
97. Garages, Tire & Rep. Shops			97
98. Grain Dealers			98
99. Grocery & Meat Mkts.			99
100. Hardware & Appl'ce Stores			100
101. Hatcheries			101
102. Hospitals			102
103. Hotels & Rooming House			103
104. Implement Dealers			104
105. Jewelry Stores			105
106. Liquor Stores			106
107. Lumber & Coal Dealers			107
108. Machine Shops			108
109. Manufacturers			109
110. Motion Picture Dist'rs.			110
111. Motor Vehicle Dealers			111
112. Nurseries			112
113. Offices, Real Est., Ins., etc.			113
114. Oil Dealers Retail			114
115. Oil Distributors			115
116. Optometrists			116
117. Packing & Process'g Plants			117
118. Photography Shops			118
119. Plmbg. & Electrical Contr's			119
120. Pool Halls & Taverns			120
121. Post Office Fixtures			121
122. Printing & Binding Plants			122
123. Produce Stations			123
124. Radio Shops			124
125. Shoe Repair Shops			125
126. Shoe Stores			126
127. Sugar Mfgrs.			127
128. Theatres			128
129. Variety Stores			129
130. Veterinarians			130
131. Well Drillers			131
132. Wholesalers & Dis'butors			132
133. Miscellaneous Business: [redacted]			133
134. 50% Penalty, F'lure to List			134
135. TOTAL TANGIBLE		8 5 6 7 5	135

TOTAL VALUE COLUMNS ONE AND TWO

G. INVENTORY COMPUTATION FROM BOOKS (Do Not Reduce by Any Percentage)

1. Actual Value of Inventory as of End of Fiscal Yr.		
2. Goods Pur. From End of Fiscal Yr. to Mar. 10		
3. Total of Lines 1 & 2		
4. Total Sales From End of Fiscal Yr. to Mar. 10		
5. Less Gross Profit (____ %) Amount		
6. Net Cost of Goods Sold (Difference between 4 & 5)		
7. Value of Inventory Mar. 10 (Difference Between 3 & 6)		
8. Value of Motor Vehicles, Dealers Only (Form 6 Attached)		
9. Value of Total Inventory Mar. 10 (Total of Lines 7 & 8) TOTAL SECTION G	G	
H. EXCESS CAPITAL INVESTED BY GRAIN DEALERS, OIL DEALERS, MOTION PICTURE DISTRIBUTORS AND SUGAR MANUFACTURERS (Special Schedule Form 5 Attached)	H	
I. IMPROVEMENTS ON LEASED LAND. 755,785	I	7 5 5 7 8 5
Grand Total Value Sections F, G, H and I (Carry to Proper Line at Right. Do not reduce by Any Percentage)		9 2 6 2 5

K. INTANGIBLE PROPERTY CLASS "A"

1 Money on Hand, in Banks Checking and Savings Accounts		1
2 Postal Savings		2
3 Checks, Drafts or Bills of Exch.		3
.75 per $100.00 TOTAL CLASS "A" Intangible		A

L. INTANGIBLE PROPERTY—CLASS "B"

4. Shares of stock in corporations, the capital stock of which is not assessed or taxed in this state. (List names on back hereof.)		4
5. Stock or shares of building and loan associations (Total amount ($____) ten per cent of which is		5
6. Securities, debentures and bonds, (except those of the United States, this State, or any political subdivision thereof)		6
7. Notes, secured or unsecured, (except notes secured by mortgages on real estate situated in Nebraska)		7
8. Due bills, annuities, royalties and all sums of money receivable at stated periods		8
9. Book acc'ts or open acc'ts, judgments, other claims and demands for money or other valuable consideration or things not named		9
10. Value of capital stock, Nebraska & domesticated corporations (Special Schedule Form 4 attached)		10
.33 per $100.00 TOTAL CLASS "B" INTANGIBLE		B

M. STATE OF NEBRASKA } = OATH

COUNTY OF Lancaster }

I, the undersigned, being duly sworn, say that the foregoing statement and schedule is true and contains a full and complete list of all property held by or belonging to me on March 10. Such property has been fully and fairly described and its true condition represented, and I have in no case sought to misrepresent the quantity or quality of the property. I further swear that my answers to the following interrogatories are true, so help me God.

Signed [redacted]

By [redacted]

Subscribed in my presence, and sworn to before me this 23 day of March 1982. Everett Peterson

CITY Ex. No. 5
ROY L. PETERSON
COURT REPORTER

Reviewed and corrected	By Co. Assessor	By Co. Board	By State Board
Tangible Totals			
Class A Totals			
Class B Totals			

THIS SCHEDULE WILL NOT BE ACCEPTED UNTIL OATH IS SIGNED AND ALL INTERROGATORIES ARE ANSWERED ON BACK HEREOF.

20

Interrogatory 4: Have you, at any time since March 10 in the preceding year, withdrawn from any bank any money deposited therein for the purpose of converting the same into some form of nontaxable property, or for the purpose of sending the same out of the state, or transferring the same to some other person or persons, with the intent or purpose of evading the payment of tax on the same?

Answer.....

GENERAL INSTRUCTIONS

1. According to the provisions of Section 77-1229, R.R.S. Nebr. 1943, you are required to make out a true statement, list or schedule of all intangible and tangible personal property subject to taxation which is held by you as owner, lessee or occupant in control thereof, or as guardian, husband, parent, trustee, executor, administrator, receiver, accounting officer, partner, agent or other representative officer. You are further required to verify said statement, list or schedule under oath before the county assessor, his assistants, a notary public or some other person authorized by law to take acknowledgments and return same to the county assessor or his assistants on or before April 20th. The law states the word "None" must be written opposite each item where no property of that kind is owned. Return intangible and tangible personal property of wife and children on this schedule unless separate schedules are filed.

2. While property is listed for taxation as of March 10, nevertheless Section 77-1211, R.R.S. Nebr. 1943, provides for the listing of property brought into the State or county after the tenth day of March and prior to the first day of July.

3. Section 77-412, R.R.S. Nebr. 1943, empowers the county assessor to add to the return of any taxpayer items of property he may find have been omitted and to change the valuation of any item of property in the return to what he deems to be its actual value. Notice of such change shall be given to the taxpayer or his agent by postcard to the address of the taxpayer shown on the return.

4. Section 77-413, R.R.S. Nebr. 1943, provides that any personal property either tangible or intangible which was not returned for taxation for any or all of the three previous years shall be taxed at the rate of levies for the year in which such property was omitted, and there shall be added interest at the rate of 7 percent plus a penalty of 10 percent of the tax on tangible property and 50 percent of the tax on intangible property.

5. The County Board of Equalization, which is composed of the County Board, the County Assessor, and the County Clerk, meets on the first Monday in May and continues in session not more than fifty days, or less than three days.

6. If you are doing business as a corporation organized under the laws of Nebraska, this schedule must be accompanied by the Nebraska Corporation Schedule, Form 4, properly filled out.

SPECIAL INSTRUCTIONS FOR COMPUTING THE BUSINESS AND PROFESSIONAL SCHEDULE

The Business and Professional Schedule is made up of 13 parts lettered "A" to "M" inclusive. Contents of each section should be carefully considered and accurately completed.

A. Enter the full name of the owner together with the trade name of the business and the information requested as to its location. Indicate whether the business is organized as a corporation, partnership or individual proprietorship. If a corporation or partnership, owner's name and trade name may be identical. In such case, list in both spaces provided. All corporations will complete the supplemental Corporation Schedule, Form 4, and attach the same to this report.

B. The assessor or his assistant will complete this section.

C. State correctly type of business you are in, such as "Grocery Store," "Department Store," etc. Your business should conform to one or more of the classifications listed in Section J. If none of the businesses enumerated in Section J properly describe your enterprise, you may substitute your own description in the space provided.

D. Answer the questions in Section D correctly, especially if you have moved since making your last return, as it will facilitate assessing your motor vehicles in the correct taxing district.

E. List all motor vehicles used in the business, whether licensed or not; include trailers.

F. List items of furniture and equipment in this section. All business establishments will have some items in the first or general group. After completing the listings in this group, choose from the remaining groups the one that most nearly fits the particular type of business and list the remaining items of Furniture and Equipment. Items not listed on the schedule should be written on the blank lines under the heading "Miscellaneous and Specialized."

G. This section contains the formula for computing the value of merchandise on hand March 10, and Section G must be filled out completely and the final value entered on line 9 thereof.

H. Grain dealers, oil distributors, motion picture distributors and sugar manufacturers will complete the Special Schedule, Form 5, in accordance with instructions thereon, and carry the value of excess capital invested to line H.

I. Here you will enter the value of all improvements owned by the business which are not assessed and taxed as real estate.

J. The grand total of Sections F, G, H and I, will be carried to the right and entered opposite the classification corresponding to that shown in Section C. If you are the custodian of any property not owned by your business, or if you have merchandise on consignment owned by others, you must make another schedule for that property and sign the same as agent for the respective concern.

K. You are held responsible for filling this part of the schedule truthfully. This type of property is subject only to an intangible tax of 25c on every one hundred dollars' valuation.

L. Furnish this information as requested.

M. Look your schedule over carefully before signing. Bear in mind that you are swearing under oath to its accuracy and that penalties in addition to those outlined in paragraph 4 of the General Instructions can be levied if a fraudulent return is made. See Sections 77-1232, R.R.S. Nebr. 1943 and 77-1233, R.R.S. Nebr. 1943.

SPECIAL NOTICE: Special supplementary schedules must be completed by the following types of business and the same attached to this schedule before returning to the County Assessor:

1. Corporations organized under the laws of the State of Nebraska; 2. Motor vehicle dealers; 3. Grain dealers, oil distributors, motion picture distributors and sugar manufacturers.

If you are one of the above and do not have a special schedule along with this schedule, request one from your County Assessor at once.

FORM AUTHORIZED BY STATE TAX COMMISSIONER
OMAHA PRINTING COMPANY

18. Safes, Storage Cabinets			
19. Scales			
20. Signs and Sign Panels			
21. Television Sets			
22. Tools, All Kinds	1	30	
23. Typewriters and Mimeographs			
24. Vending Machines			
Professional			
1. Barber Chairs and Tools			
2. Book Cases-Magazine Stands			
3. Burial Equipment			
4. Comptometers			
5. Davenports and Settees			
6. Dental Chairs and Tools			
7. Dictaphones and Teletypes			
8. Hair Dryers			
9. Hospital Beds			
10. Operating Tables			
11. Permanent Wave Machines			
12. Professional Libraries			
13. Sun Lamps-Sterilizers			
14. Surgical Instruments			
15. X-Ray Equipment			
16. Other Prof. Equipment			
Retail Stores			
1. Cutters and Slicers			
2. Refrigeration Units			
3. Refrigerated Show Cases			
4. Refrig. Lockers & Equipment			
5. Shopping Buggies			
Lodging, Refreshment, Recreation			
1. Back Bars and Mirrors			
2. Beverage Coolers			
3. Booths and Tables			
4. Bowling Alleys and Equip.			
5. Carpets, Rugs and Draperies			
Carry This Total Forward	1	70	

12. Vulcanizing and Tire Equip.			
13. Welding Equipment			
14. Wheel Alignment Equip.			
Wholesale-Industrial Construction, Etc.			
1. Bottle Washers			
2. Bottling Machines			
3. Bulldozers-LaTourneaus			
4. Canning Machines			
5. Can Washers-Cream Testers			
6. Cement Mixers			
7. Churns-Past'rizers-Homog'izrs			
8. Conveyors-Elevators			
9. Dehydrating Machines			
10. Diesel Motors			
11. Dragpans-Graders			
12. Drills and Dies			
13. Grain Dryers			
14. Grinders, Milling Equip.			
15. Incubators-Brooders			
16. Land Rollers-Scoops			
17. Lowboys			
18. Machine Saws-Lathes			
19. Packers-Airhammers			
20. Planing Equip. Sanders			
21. Tractors			
Miscellaneous and Specialized			
1. Household appliances	10	8	410
2.			
3.			
4.			
5.			
6.			
7.			
8.			
9.			
TOTAL VALUE COLUMNS ONE AND TWO F	10	8	580

99. Grocery & Meat Mkts.			99
100. Hardware&Appl'ceStores			100
101. Hatcheries			101
102. Hospitals			102
103. Hotels & Rooming House			103
104. Implement Dealers			104
105. Jewelry Stores			105
106. Liquor Stores			106
107. Lumber & Coal Dealers			107
108. Machine Shops			108
109. Manufacturers			109
110. Motion Picture Dist'rs.			110
111. Motor Vehicle Dealers			111
112. Nurseries			112
113. Offices, Real Est., Ins., etc.			113
114. Oil Dealers Retail			114
115. Oil Distributors			115
116. Optometrists			116
117. Packing & Process'g Plants			117
118. Photography Shops			118
119. Plmbg.&ElectricalContr's			119
120. Pool Halls & Taverns			120
121. Post Office Fixtures			121
122. Printing & Binding Plants			122
123. Produce Stations			123
124. Radio Shops			124
125. Shoe Repair Shops			125
126. Shoe Stores			126
127. Sugar Mfgrs.			127
128. Theatres			128
129. Variety Stores			129
130. Veterinarians			130
131. Well Drillers			131
132. Wholesalers & Dis'butors			132
133. Miscellaneous Business: (Specify)			133
134. 50% Penalty, F'lure to List			134
135. TOTAL TANGIBLE	27	7	580 135

G. INVENTORY COMPUTATION FROM BOOKS (Do Not Reduce by Any Percentage)

1. Actual Value of Inventory as of End of Fiscal Yr.							
2. Goods Pur. From End of Fiscal Yr. to Mar. 10.							
3. Total of Lines 1 & 2							
4. Total Sales From End of Fiscal Yr. to Mar. 10							
5. Less Gross Profit (%) Amount							
6. Net Cost of Goods Sold (Difference between 4 & 5)							
7. Value of Inventory Mar. 10 (Difference Between 3 & 6)							
8. Value of Motor Vehicles, Dealers Only (Form 6 Attached)							
9. Value of Total Inventory Mar. 10 (Total of Lines 7 & 8). TOTAL SECTION G						G	
H. EXCESS CAPITAL INVESTED BY GRAIN DEALERS, OIL DEALERS, MOTION PICTURE DISTRIBUTORS AND SUGAR MANUFACTURERS (Special Schedule Form 5 Attached)						H	
I. IMPROVEMENTS ON LEASED LAND 2,670,000						2	670 000
Grand Total Value Sections F, G, H and I (Carry to Proper Line at Right. Do not reduce by Any Percentage)						27	7 580

K. INTANGIBLE PROPERTY CLASS "A"

1 Money on Hand, in Banks Checking and Savings Accounts							1
2 Postal Savings							2
3 Checks, Drafts or Bills of Exch.							3
.35 per $100.00 TOTAL CLASS "A" Intangible						0	A

L. INTANGIBLE PROPERTY—CLASS "B"

4. Shares of stock in corporations, the capital stock of which is not assessed or taxed in this state. (List names on back hereof.)							4
5. Stock or shares of building and loan associations (Total amount ($) ten per cent of which is							5
6. Securities, debentures and bonds, (except those of the United States, this State, or any political subdivision thereof)							6
7. Notes, secured or unsecured, (except notes secured by mortgages on real estate situated in Nebraska)							7
8. Due bills, annuities, royalties and all sums of money receivable at stated periods							8
9. Book acc'ts or open acc'ts, judgments, other claims and demands for money or other valuable consideration or things not named							9
10. Value of capital stock, Nebraska & domesticated corporations (Special Schedule Form 4 attached)							10
.35 per $100.00 TOTAL CLASS "B" INTANGIBLE							B

M. STATE OF NEBRASKA
COUNTY OF Lancy } = OATH

I, the undersigned, being duly sworn, say that the foregoing statement and schedule is true and contains a full and complete list of all property held by or belonging to me on March 10. Such property has been fully and fairly described and its true condition represented, and I have in no case sought to misrepresent the quantity or quality of the property. I further swear that my answers to the following interrogatories are true, so help me God.

Signed Copy. Mailed -

By

Subscribed in my presence, and sworn to before me this 1st day of May 1951 Ernest Nielsen

Returned and corrected	By Co. Assessor	By Co. Board	By State Board
Tangible Totals	13 6 9 2 9 0		
Class A Totals			
Class B Totals			

THIS SCHEDULE WILL NOT BE ACCEPTED UNTIL OATH IS SIGNED AND ALL INTERROGATORIES ARE ANSWERED ON BACK HEREOF.

Prior E.R. No. 6
ROY A. PETERSON
COUNTY ASSESSOR

LIST ALL PROPERTY AT ACTUAL VALUE
ON 5% OF LISTED VALUE

[fol. 307] ARTICLES OF INCORPORATION OF OFFUTT HOUSING COMPANY

The undersigned, Carl C. Wilson, 4921 Pratt Street, Harland L. Mossman, Jr., 3612 North 49th Street, and Robert J. Wilson, 3620 North 49th Street, all of Omaha, Douglas County, Nebraska, associate themselves together for the purpose of forming a corporation under the laws of Nebraska, and for that purpose adopt these Articles of Incorporation.

I

Name

The name of this corporation is Offutt Housing Company.

II

Place of Business—Resident Agent

The principal place of business of the corporation is Omaha, Douglas County, Nebraska. The resident agent is Robert J. Wilson, 918 City National Bank Building, Omaha, Nebraska.

III

General Nature of Business

The purpose for which the corporation is formed and the business and objects to be carried on and promoted by it are as follows:

1. To create a private corporation to provide housing for rent or sale, and to acquire any real estate or interest or rights therein or appurtenant thereto and any and all personal property in connection therewith.

2. To improve and operate, and to sell, convey, assign, mortgage or lease any real estate and any personal property.

3. To borrow money and issue evidence of indebtedness in furtherance of any or all of the objects of its business; to secure the same by mortgage, deed of trust, pledge or other lien.

4. To apply for and obtain or cause to be obtained from the Federal Housing Commissioner a contract or contracts of mortgage insurance pursuant to the provisions of the

National Housing Act as amended, covering bonds, notes and other evidences of indebtedness issued by this corporation and any indenture of mortgage or deed of trust securing the same. So long as any property of this corporation is encumbered by a mortgage or deed of trust insured by the Federal Housing Commissioner it shall engage in no business other than the construction and operation of a Rental Housing Project or projects.

5. To enter into, perform and carry out contracts of any kind necessary to, or in connection with, or incidental to the accomplishment of any one or more of the purposes of the corporation."

IV

Capital Stock

The amount of the authorized capital stock of the corporation shall be Eight Hundred Thousand and no/100 Dollars [fol. 308] ($800,000.00), consisting of Eighty Thousand (80,000) shares of which ten (10) shares having a par value of $10.00 per share shall be designated "Preferred Stock" and Seventy-nine Thousand Nine Hundred Ninety (79,990) shares having a par value of $10.00 per share shall be designated "Common Stock". The minimum amount of capital with which the corporation will commence business is One Hundred Thousand Dollars ($100,000.00). The shares of capital stock shall have the preferences and restrictions as follows:

1. The holders of the preferred stock shall be entitled to receive, when and as declared by the Board of Directors, noncumulative dividends at the rate of Fifty cents (50¢) per share per annum, before any sum or sums shall be set apart for or applied to the purchase or redemption of the preferred stock and before any dividend or other distribution shall be declared, set apart, paid or made in respect of the common stock.

2. The net earnings of the corporation, after providing therefrom dividends on preferred stock and all reserves hereinafter required, may be applied each year in payment of dividends to common stockholders.

3. The preferred stock at any time outstanding may be redeemed by the corporation at par and dividends declared

thereon, but unpaid to the date of such redemption, provided, however, that such stock shall be so redeemed, upon, but in no event before, the termination of any contract of mortgage insurance covering any indebtedness of the corporation without obligation upon the Commissioner to issue debentures as a result of such termination. Preferred stock so redeemed shall be retired and canceled.

4. Anything to the contrary herein notwithstanding, no dividends shall be paid upon any of the capital stock of the corporation (except with the consent of the holders of a majority of the shares of each class of stock then outstanding) until all amortization payments due under the mortgage insured by the Federal Housing Commissioner have been paid, and until a reserve fund for replacements is first established and maintained by the allocation to such reserve fund in a separate account with the mortgagee (or in the case of a deed of trust with the beneficiary) or in a safe and responsible despository designated by the morfgagee commencing on the date of the first payment towards amortization of the principal of the mortgage insured by the Commissioner unless a later date is approved in writing by the holders of the preferred stock, of an amount equal to Two Thousand Two Hundred Seventy-Nine and 34/100 ($2,279.34) Dollars and a like amount monthly thereafter. Such a fund whether in the form of a cash deposit or invested in obligations of, or fully guaranteed as to principal and interest by the United States of America shall be at all times under the control of the mortgagee. Disbursements from such fund, whether for the purpose of effecting replacements of structural elements, furnishings and mechanical equipment of the project or for any other purpose, may be made only after receiving the consent in writing of the holders of the preferred stock.

5. In the event of any default by the corporation, as hereinafter defined, and during the period of such default, the holders of the preferred stock, voting as a class, shall be entitled to remove all existing directors of the corporation, and to elect new directors in their stead, provided, however, that one of said directors shall be the owner or holder of one or more shares of common stock. When such default or defaults shall have been cured, the right to elect directors shall again vest in the holders of the common stock.

6. Execute or file for record any instrument which imposes a restriction upon the sale or occupancy of the project or any part thereof on the basis of race, color, or creed, or execute any agreement, lease, or conveyance affecting the mortgaged property which imposes any such restriction upon its sale or occupancy.

V

Preferred Stock—Additional Powers

The corporation shall not without prior approval of the holders of a majority of the shares of preferred stock, given [fol. 309] either in writing or by vote at a meeting of the preferred stockholders called for that purpose:

1. Assign, transfer, dispose of or encumber any real or personal property, including rents, except as specifically permitted by the terms of the mortgage.

2. Remodel, reconstruct, demolish or subtract from the premises constituting the project and subject to such mortgage.

3. Permit the occupancy of any of the dwelling accommodations of the corporation except at or below the rents fixed by the schedule of rentals provided hereinafter.

4. Require as a condition to the occupancy or leasing of any unit in the project the purchase of any corporation stock either from the corporation or any stockholder or the payments of any consideration other than the reasonable rentals provided for in the schedule of rentals to be filed with approved by the holders of the preferred stock as provided hereinafter.

5. Consolidate or merge the corporation into or with any other corporation; go into voluntary liquidation; carry into effect any plan of reorganization of the corporation; redeem or cancel any of its shares of preferred stock, or effect any changes whatsoever in its capital stock; alter or amend the certificate of incorporation or fail to establish and maintain reserves as set forth in this certificate of incorporation.

VI

Preferred Stock—Additional Provisions

1. The happenings of any of the following events shall constitute a default within the meaning of that word as used in this certificate:

(a) The failure of the corporation to have dismissed within thirty days after commencement any receivership, bankruptcy or other form of liquidation instituted by or against the corporation;

(b) The failure of the corporation to pay the principal, interest, or any other payment due on any note, bond, or other obligation executed by it, as called for by the terms of such instrument;

(c) The failure of the corporation to establish and maintain the reserve fund for replacements provided for in Article IV hereof o the use of such fund except as permitted in said section;

(d) The failure of the corporation, continuing for a period of fifteen days, to perform any of the covenants, conditions or provisions required by it to be performed by this certificate, the By-Laws of the corporation, the mortgage or any contract to which the corporation and the Commissioner shall be parties, or fail to carry out in full the terms of any agreement whereby the loan covered by the insured mortgage is to be advanced or the project is to be constructed and operated.

2. In the event the mortgagor is in default under the terms of this certificate of incorporation or has failed to perform the covenants required by it to be performed under the terms of this certificate or by any mortgage insured by the Commissioner, the Commissioner may require the corporation to furnish at the expense of the corporation a complete audit of its books of account duly certified by a certified public accountant.

[fol. 310] 3. Upon any default by the corporation, the President or the Secretary, or either of them, as may be required by law, shall, at the request in writing of the holders of record of a majority of shares of the preferred stock, addressed to him at the office of the corporation

hereinabove designated and stating the purpose of the meeting, forthwith call a special meeting to take place within ten days after such call, of the preferred stockholders for the purpose of the removal of existing directors and the election of new directors. If such officers shall fail to issue a call for such meeting within three days after the receipt of such request, then the holders of a majority of the shares of the preferred stock may do so by giving notice as provided by law, or, if not so provided, then by giving ten days' notice of the time, place and object of the meeting by advertisement inserted in any newspaper published in the county or city in which the principal office of the corporation is situated. When such default shall have been cured, the President or the Secretary, or either of them, as may be required by law, shall, at the written request of the holders of a majority of the outstanding shares of the capital stock of the corporation, call in the manner provided by law, a special meeting of the stockholders of the corporation at which the then existing directors may be removed and new directors elected in the usual manner provided in this certificate of incorporation. Such officer shall give notice as provided by law, or, if not so provided, he shall give ten days' notice of the time, place and object of such meeting as above provided.

VII

Miscellaneous Provisions

The following provisions are hereby adopted for the conduct of the affairs of the corporation and in regulation of the powers of the corporation, the directors and stockholders:

1. Dwelling accommodations of the corporation shall be rented at a maximum average rental per room per month fixed by the Board of Directors of the corporation and approved by the holders of the preferred stock. A schedule of rentals for the reasonable rental value of each apartment based upon the average as so determined shall be filed with the holders of the preferred stock, prior to leasing or offering for lease of any of the dwelling accommodations of the project, and when approved by them,

shall thereafter be maintained except as provided in Article V hereof. Dwelling accommodations of the corporation shall not be rented for a period in excess of three years nor shall the property be rented as an entirety without prior written approval of the preferred stockholder. Store accommodations shall be rented at a rental to be fixed by the directors with the prior written approval of the holders of the preferred stock.

(a) The corporation shall have the right to charge to and receive from any tenant such amounts as from time to time may be mutually agreed upon between tenant and the corporation with the written approval of the holders of a majority of the shares of preferred stock, for any facilities and/or services which may be furnished by the corporation to such tenant upon his request, over and above the facilities and services to which such tenant may be entitled by virtue of his lease, including, among other things, telephone operator and switchboard services, electric current, gas, air cooling and conditioning and other additional or extraordinary facilities or services which may be furnished by the corporation in connection with the operation of such housing facilities.

2. The corporation shall maintain its accommodations and the grounds and equipment appurtenant thereto in good and substantial repair and conditions, provided, that in the event all or any of the buildings covered by the mortgage shall be destroyed by fire or other casualty, the money derived from any insurance on the property shall be applied in accordance with the terms of the insured mortgage on the premises.

[fol. 311] 3. The corporation, its property, equipment, buildings, plans, offices, apparatus, devices, books, contracts, records, documents and other papers relating thereto shall be subject to examination and inspection at any reasonable time by the Commissioner or his duly authorized agents; the corporation shall keep full and complete records of all corporate meetings of directors and stockholders and shall also keep copies of all written contracts or other instruments which affect it or any of its property,

all or any of which may be subject to inspection and examination by the Commissioner or his duly authorized agents.

4. The books and accounts of the corporation shall be kept in accordance with the uniform system of accounting prescribed by the holders of the preferred stock.

5. The corporation shall furnish the Commissioner within sixty days following the end of each fiscal year a complete annual financial report.

6. At the request of the Commissioner, or of the holder of a majority of shares of the preferred stock, his or their agents, employees or attorneys, the corporation shall give specific answers to questions upon which information is desired from time to time relative to the income, assets, liabilities, contracts, operation and condition of the property and the status of the insured mortgage and any other information with respect to the corporation or its property which may be requested.

VIII

Commencement and Duration

The existence of the corporation shall commence immediately upon the filing of these Articles with the Secretary of State and the County Clerk as provided by law and the duration of the corporation shall be perpetual.

IX

Private Property Not Subject to Corporate Debts

The private property of the stockholders shall not be subject to the payment of corporate debts, but shall be exempt from liability therefor.

X

Board of Directors

The affairs of the corporation shall be conducted by a Board of Directors consisting of not fewer than three nor more than six directors. Until the first annual meeting and until their successors are elected and qualify the directors shall be:

Carl C. Wilson

Harland L. Mossman, Jr.
Robert J. Wilson

Thereafter, directors shall be elected by the stockholders, and shall hold office until their successors are elected and qualify. Additional directors may be elected as the By-Laws may provide.

XI

Officers

The officers of the corporation shall be a President, Vice-President, Secretary and Treasurer, who shall be chosen by the directors or stockholders as the By-Laws [fols. 312-318] may direct. The corporation may have other officers and agents who shall be chosen in such manner and hold their offices for such terms as may be prescribed by the By-Laws or determined by the Board of Directors. Any two offices, except those of President and Vice-President, may be held by the same person.

XII

By-Laws

Original By-Laws may be adopted by the incorporators. Thereafter, By-Laws may be made, altered or repealed by the Board of Directors with the written consent of the holders of the preferred stock.

XIII

Annual Meeting

The annual meeting of the stockholders shall be held on the second Tuesday after the first Monday in April of each year at 3:00 o'clock p.m. Special meetings of the stockholders shall be held on the call of the President. At the annual meeting, the stockholders shall elect directors for the ensuing term.

XIV

Amendment.

These Articles may be amended by vote of the holders of the majority of the issued and outstanding capital stock

at any annual meeting, or at any special meeting called for that purpose in accordance with the provisions of the By-Laws, with the written consent of the holders of the preferred stock, so long as it is outstanding.

In Witness Whereof, the undersigned hereunto sign their names this 22nd day of December A.D., 1950.

Carl C. Wilson, Harland L. Mossman, Jr., Robert J. Wilson.

Witness: G. B. Mosher.

STATE OF NEBRASKA,
County of Douglas, ss:

Before me, the undersigned, a Notary Public in and for Douglas County, Nebraska, on the 22nd day of December, A.D., 1950, personally appeared Carl C. Wilson, Harland L. Mossman, Jr., and Robert J. Wilson, to me known to be the identical persons who signed the above and foregoing Articles of Incorporation, and they acknowledged the said Articles and execution thereof to be the voluntary act and deed of themselves, the signers, respectively.

Witness my hand and Notarial Seal affixed hereto at Omaha, Nebraska, the date last aforesaid.

Howard A. McLaughlin, Notary Public in and for Douglas County, Nebraska.

Recorded in County Clerk's Office, Douglas County, Nebraska on December 23, 1950, at 9:05 a. m., John Slavik, County Clerk, 575.

[fols. 319-320] EXHIBIT 12

Administrative Rules and Regulations for Military Housing Insurance under Title VIII of the National Housing Act

(A new Title added to the National Housing Act by Act approved August 8, 1949, as amended May 2, 1950 and September 1, 1951)

Revised September 4, 1951
Federal Housing Administration
Washington, D. C.

* * * * * * *

[fol. 321] Section II

Application and Commitment

* * * * * * *

3. The application must be accompanied by the mortgagee's check to cover, (a) an "Application Fee" computed at the rate of one dollar and fifty cents ($1.50) per thousand dollars ($1,000) of the original face amount of the mortgage loan for which application is made, to cover the costs of analysis by the Commissioner, and (b) a sum (referred to as "Commitment Fee") which when added to the Application Fee will aggregate three dollars ($3.00) per thousand of the face amount of the mortgage loan approved for insurance by the Commissioner, and which shall be paid at the time of delivery of the commitment. If the application is refused without an estimate of replacement costs being made by the Commissioner, the fee paid will be returned to the applicant. If, after insurance, the amount of an insured mortgage is increased either by amendment or by the substitution of a new insured mortgage, a further fee shall be paid, based upon the amount of such increase.

* * * * * * *

5. An inspection fee computed at the rate of five dollars ($5.00 per thousand dollars of the face amount of the commitment shall be paid as provided for in the commitment.

Exhibit 13

FHA Form No. 2564-W
Revised May 1948

FEDERAL HOUSING ADMINISTRATION

AMENDED

PROJECT ANALYSIS

Date January 24, 1951 — UNDER SECTION 608 — Project No. 103-[illegible]0001

Name of project Offutt Housing Company
Location Offutt Field
Omaha, Nebraska
Type of project 2 Sty. Wall Construction Frame
Accessory buildings None

Number of rooms 2938
Number of family units 611
Average rooms per family unit 4.808
Estimated average rent p. r. p. m. $ 13.94
Average rent per family unit p. m. $ 67.02

ESTIMATE OF INCOME

INCOME (Dwelling Units):

Number of Each Unit Type	Percent of Total Units	Rooms Per Unit	Composition of Units (L. R., 2 B. R., K., etc.)	Est'd Unit Rent Per M	Monthly Rent at 100% Occupancy	Annual Rent at 100% Occupancy
0 10	1.64	3.5	LR-BR-K	$ 64	$ 640	$ 7,680
0 90	14.73	4.5	LR-2BR-K	73	6,570	78,840
A 199	32.57	5.5	LR-3BR-K	85	16,915	202,980
A 75	12.28	3.5	LR-BR-K	47	3,525	42,300
A 162	26.51	4.5	LR-2BR-K	53	8,586	103,032
A 75	12.27	5.5	LR-2BR-K	63	4,725	56,700

TOTAL NUMBER OF ROOMS 2938 @ average rental of $13.94 p. r. p. m. . . . $ 40,961 $ 491,532

ACCESSORY INCOME (Garages, stores, etc.):

Number	Type	Estimated Rent Per M.	Annual Rent at 100% Occupancy
	None	$	$

TOTAL ACCESSORY INCOME . . . . . $

TOTAL ESTIMATED INCOME AT 100% OCCUPANCY . . . . . $ 491,532

ESTIMATED ANNUAL OPERATING EXPENSE

	Unit Basis of Estimate	Amount Per Unit	Amount Per Item	Total
RENTING EXPENSE:				
Advertising				

DECORATING

MATERIALS ONLY (Labor on "Decorating Pay Roll")
MATERIALS AND LABOR (Contract price)
(Strike out inapplicable line above)

164

2

ESTIMATE OF TAXES

IMPROVEMENTS:

	Assessor's Reproduction Cost	Percent Depreciated or Equalized	Assessor's Valuation	Percent of Assessment	Assessed Value	Tax Rate Per $1,000	Annual Tax
Main Bldgs.	$	%	$	%	$		$
Garages		%		%			
Other		%		%			

TOTAL ANNUAL TAX FOR IMPROVEMENTS . . Government Lease . . . . . $ 100.00

LAND:

Estimated assessed value upon completion of improvements . . . . . $

Estimated tax rate (normal land tax) . . . . . $ . . . . . per . . . . .

ESTIMATED TOTAL LAND TAX . . . . . $

TOTAL ESTIMATED REAL ESTATE TAX (PER ROOM $) PER ANNUM . . . . .

MISCELLANEOUS OPERATING TAXES:

Social Security tax . . . . . $ 360.

Other special local taxes Cost of Street & Utility Maintenance . . . . 13,904.

TOTAL MISCELLANEOUS OPERATING TAXES 14,264.00

TOTAL TAXES (excluding INCOME, CAPITAL STOCK AND FRANCHISE TAXES) 14,364.00

ESTIMATED ANNUAL OPERATING STATEMENT

INCOME: (See schedule page 1)	Annual Income at 100% Occupancy	Estimated Occupancy %	Gross Income Expectancy
Dwelling units	$ 491,532.	97%	$ 476,786.
Garages			
Stores			
TOTAL ESTIMATED INCOME	491,532.		
GROSS INCOME EXPECTANCY			$ 476,786.

OPERATING EXPENSES AND TAXES:

Operating 2938 rooms @	$ 37.15 p.r.p.a.	$ 109,272.	
Reserve for replacements @	9.34 p.r.p.a.	27,352.	
TOTAL TAXES (excluding INCOME, CAPITAL STOCK AND FRANCHISE TAXES)		14,364.	
TOTAL OPERATING EXPENSES AND TAXES			149,988.
ESTIMATED NET INCOME, AFTER OPERATING EXPENSES AND TAXES			326,798.

EQUIPMENT AND SERVICES INCLUDED IN RENT

Equipment Furnished Tenants	Services Included in Rent	
Ranges (gas or electric)	Water (hot and cold)	Cold
Refrigerators	Space heat	
Kitchen exhaust fans	Janitor service	Yes
Attic vent fan	Grounds maintenance	Yes

Section III

Eligible Mortgages.

* * * * * * *

[fol. 322] 2. The mortgage must secure a principal obligation in multiples of one hundred dollars ($100) but not exceeding five million dollars ($5,000,000) and not in excess of ninety per centum (90%) of the amount which the Commissioner estimates will be the replacement cost of the property or project when the proposed improvements are completed. Such part of the mortgage as may be attributable to dwelling use shall not exceed eighty-one hundred dollars ($8,100) per family unit (which amount the Commissioner may by regulation increase by not exceeding nine hundred dollars ($900) in any geographical area where he finds that cost levels so require), except that where the Secretary of Defense or his designee (with respect to projects designed for rent for residential use by civilian and military personnel of the Army, Navy, Marine Corps and Air Force), or the Atomic Energy Commission or its designee (with respect to a project designed for rent for residential use by personnel of the Atomic Energy Commission) in exceptional cases certifies and the Commissioner concurs in such certification that the needs would be better served by single-family detached dwelling units the mortgage may involve a principal obligation not to exceed nine thousand dollars ($9,000) per family unit for such part of such property as may be attributable to such dwelling units.

* * * * * * *

[fol. 323] 8. The mortgage shall provide for such equal monthly payments by the mortgagor to the mortgagee as will amortize the ground rents, if any, and the estimated amount of all taxes, water rates and special assessments, if any, and fire and other hazard insurance premiums, within a period ending one month prior to the dates on which the same become delinquent. The mortgage shall further provide that such payments shall be held in trust for the benefit and account of the mortgagor by the mortgagee, for the purpose of paying such ground rents, taxes, water rates and

assessments, and insurance premiums, before the same become delinquent. The mortgage must also make provision for adjustments in case the estimated amount of such taxes, water rates and assessments, and insurance premiums shall prove to be more, or less, than the actual amount thereof so paid by the mortgagor.

9. All monthly payments to be made by the mortgagor to the mortgagee as hereinabove provided in subsections 4 to 8 inclusive, shall be added together and the aggregate amount thereof shall be paid by the mortgagor each month in a single payment. The mortgagee shall apply the same to the following items in the order set forth:

(a) premium charges under the contract of insurance;

(b) ground rents, taxes, water rates, special assessments, and fire and other hazard insurance premiums;

(c) interest on the mortgage; and

(d) amortization of the principal of the mortgage.

Any deficiency in the amount of any such aggregate monthly payments shall, unless made good by the mortgagor prior to or on the due date of the next such payment, constitute an event of default under the mortgage.

* * * * * * *

11. The mortgagee may charge the mortgagor the amount of the application fees provided in subsection 3 of Section II of these Rules and an initial service charge to reimburse itself for the cost of closing the transaction. Such initial service charge may be in an amount not in excess of one and one-half per centum (1½%) of the original principal amount of the mortgage.

* * * * * * *

[fol. 324] 14. (a) No mortgage covering a project designed for rent for residential use by civilan or military personnel of the Army, Navy, Marine Corps, or Air Force, shall be insured under these Rules unless the Secretary of Defense or his designee, shall have certified to the Commissioner that the housing with respect to which the mortgage is made is necessary to provide adequate housing for civilian or military personnel of the Army, Navy, Marine

Corps, or Air Force (including Government contractors' employees) assigned to duty at the military installation at or in the area of which such property is constructed, that that such installation is deemed to be a permanent part of the Military Establishment, and that there is no present intention to substantially curtail activities at such installation.

* * * * * * *

[fol. 325] Section IV

Eligible Mortgagors

* * * * * * *

2. A mortgagor must establish, in a manner satisfactory to the Commissioner, that:

(a) after completion of a project designed for rent for residential use by civilian or military personnel of the Army, Navy, Marine Corps, or Air Force, preference or priority of opportunity to occupy will be given to civilian or military personnel of the Army, Navy, Marine Corps, or Air Force and their immediate families (including Government contractors' employees), assigned to duty at the Military Installation at or in the area in which the project is located; or

* * * * * * *

4. In addition to meeting the requirements set forth above in this section, the mortgagor must be—

(a) a corporation or trust formed or created, with the approval of the Commissioner, for the purpose of providing housing for rent or sale, and possessing powers necessary therefor and incidental thereto, which corporation, or trust, until the termination of all obligations of the Commissioner under such insurance, is regulated or restricted by the Commissioner as to rents or sales, charges, capital structures, and methods of operation to such an extent as may be [fol. 326] deemed advisable by the Commissioner. Such regulation or restriction shall remain in effect until such time as the mortgage insurance contract terminates without obligation upon the Commissioner to issue debentures

as a result of such termination. So long as such contract of insurance is in effect, the corporation or trust shall engage in no business other than the construction and operation of a Rental Housing project or projects; or * * *

* * * * * * *

Section V

Supervision of Mortgagors

* * * * * * *

[fol. 327] 4. A corporate mortgagor shall be regulated through the ownership by the Commissioner of certain shares of special stock (or other evidence of beneficial interest in the mortgagor) which stock or interest will acquire majority voting rights in the event of default under the mortgage or violation of provisions of the charter of the mortgagor or the violation of any valid agreement entered into between the mortgagor, the mortgagee and/or the Commissioner, but only for a period coextensive with the duration of such default or violation. The shares of stock or of beneficial interest issued to the Commissioner, his nominee or nominees and/or the Federal Housing Administration shall be in sufficient amount to constitute under the laws of the particular State a valid special class of stock or interest and shall be issued in consideration of the payment by the Commissioner of not exceeding in the aggregate one hundred dollars ($100). Such stock shall be represented by certificates issued in the name of the Commissioner, and/or in the name of his nominee or nominees, and/or in the name of the Federal Housing Administration, as the Commissioner shall require. Upon the termination of all obligations of the Commissioner under his contract of mortgage insurance or any succeeding contract or agreement covering the mortgage obligation, including the obligation upon the Commissioner to issue debentures as a result of such termination, all regulation and restriction of the mortgagor shall cease. When the right of the Commissioner to regulate or restrict the mortgagor shall so terminate, the shares of special stock or other evidence of beneficial interest shall be surrendered by the Commissioner

upon reimbursement of his payments therefor plus accrued dividends, if any, thereon. Such regulation and the additional regulation or restriction hereinafter provided in this section shall be made effective by incorporation of appropriate provisions therefor in the charter or other instrument under which the mortgagor is created, or by agreement. In all cases where the insured mortgage is in excess of two hundred thousand dollars ($200,000), the mortgagor must be a corporation or a trust.

In the case of an individual mortgagor, regulation by the Commissioner may be exercised through a regulatory agreement in form and content satisfactory to the Commissioner.

The following are the items which will be regulated or restricted in the manner and to the extent hereinbefore indicated:

(a) No charge shall be made by the mortgagor for the accommodations offered by the project in excess of a rental schedule to be filed with the Commissioner and approved by him or his duly constituted representative prior to the opening of the project for rental, which schedule shall be based upon a maximum average rental fixed prior to the insurance of the mortgage, and shall not thereafter be changed except upon application of the mortgagor to, and the written approval of the change by, the Commissioner.

[fols. 328-356] (b) The established maximum rental shall be the maximum authorized charge against any tenant for the accommodations offered and shall include all services except telephone, gas, electric, and refrigeration facilities. Charges permitted in addition to such maximum rental shall be subject to the approval of the Commissioner.

* * * * * * *

Total Number of Rooms 2938 @ average rental of $13.94 p. r. p. m.		$ 40,961.	$ 491,532.

ACCESSORY INCOME (Garages, stores, etc.):

Number	Type	Estimated Rent Per M.	Annual Rent at 100% Occupancy
	None	$	$
Total Accessory Income			$
TOTAL ESTIMATED INCOME AT 100% OCCUPANCY			$ 491,532.

ESTIMATED ANNUAL OPERATING EXPENSE

	Unit Basis of Estimate	Amount Per Unit	Amount Per Item	Total
Renting Expense:				
Advertising				
Commissions				
Administrative Expense:				
Management				
Superintendent				
Clerical	Customary 5% of			
Telephone and telegraph	Gross Expectancy			
Legal and audit				
Office expense				
				24,576.
Operating Expense:				
Elevator power				
Elevator maintenance				
Heating and ventilating				
Janitorial expense (materials)	Room	.30	884.	
Lighting—Misc. power	"	.25	735.	
Water	"	.80	2,350.	
Gas	"	.31	910.	
Garbage and rubbish removal	"	2.05	6,025.	
Pay roll (see schedule)	"	5.82	17,100.	
	"	.72	2,115.	30,117.
Maintenance Expense:				
Decorating (see schedule)		9.81	28,820.	
Repairs		2.64	7,756.	
Refrigerating		.33	970.	
Insurance		4.58	13,450.	
Grounds Exp. (materials only)		.46	1,350.	
Furniture and furnishings				
Miscellaneous		.19	558.	
		.23	675.	53,579.
Total Operating Expenses	P. R. P. A.	37.15	x x x x	108,272.
Reserve for Replacements	P. R. P. A.		x x x x	27,352.
Total Expenses and Reserve	P. R. P. A.		x x x x	135,624.

DECORATING

Materials Only (Labor on "Decorating Pay Roll")
Materials and Labor (Contract price)
(Strike out inapplicable line above)

Tenant space	(every ... years)	$
Public space	(every 3 years)	20,627.
Exterior bldgs.	(every 5 years)	7,814.
Accessory bldgs.	(every 5 years)	379.
Total		$ 28,820.

DECORATING PAY ROLL

Position	No.	Monthly Rate	Per Annum
Total			$

OPERATING PAY ROLL

Position	No.	Monthly Rate	Per Annum
Superintendent	1		3,600.
Assistant	1		3,000.
Janitors	5		10,500.
Total			$ 17,100.

Pltf's Ex. No. 13
[illegible] J. PETERSON
[illegible] REPORTER

(1)

Dwelling units	$ 491,532.	97%	$ 476,786.
Garages			
Stores			
TOTAL ESTIMATED INCOME	491,532.		
GROSS INCOME EXPECTANCY			$ 476,786.

OPERATING EXPENSES AND TAXES:

Operating 2938 rooms @ $ 37.15 p.r.p.a.	$ 109,272.	
Reserve for replacements @ 9.34 p.r.p.a.	27,352.	
TOTAL TAXES (excluding INCOME, CAPITAL STOCK AND FRANCHISE TAXES)	14,364.	
TOTAL OPERATING EXPENSES AND TAXES		149,988.
ESTIMATED NET INCOME, AFTER OPERATING EXPENSES AND TAXES		326,798.

EQUIPMENT AND SERVICES INCLUDED IN RENT

Equipment Furnished Tenants	Services Included in Rent
Ranges (gas or electric)	Water (hot and cold) Cold
Refrigerators	Space heat
Kitchen exhaust fans	Janitor service Yes
Attic vent fan	Grounds maintenance Yes
Showers (in tub or separate) Yes (Tub)	Refrigerator current
Laundry facilities Yes	Other Energy for heating, hot water, cooking, lighting or refrigeration utilities will be billed on Pro-rata Basis
Venetian blinds	
Other	

REMARKS

Processed on the assumption that the project will not be subject to State, County or School Property Tax. If such taxes are assessed, rents will have to be adjusted accordingly.

ESTIMATED REPLACEMENT COST OF PROPERTY

IMPROVEMENTS TO LAND (Within property lines):		
New utilities	$ 332,947.	
Landscape work	29,512.	
TOTAL		$ 362,459.
STRUCTURES:		
Dwellings ..... (FROM COST ESTIMATE)	4,391,799.	
Garages ..... @ $		
Other Adm. Building	8,242.	
Taxes (Social Security, sales, etc.)		
Construction bond ..... % on $		
FEES:		
Builder... $ 4,762,500 @ 6%	285,750.	
Architect $ 5,095,875 @ 4%	201,930	
Total estimated cost of structures plus fees		4,887,721.
TOTAL FOR ALL IMPROVEMENTS		5,250,180.
CARRYING CHARGES; FINANCING: Inspection Fee	24,745	
Interest 9 mo. @ 4 % on $ 2,474,550.	74,237.	
Taxes (real estate)		
Insurance (fire, windstorm, liability, etc., during construction)	9,000.	
FHA mortgage insurance premium 5 % x Mortgage $ 4,949,100.	24,745.	
FHA examination fee 0.3% of $ 4,949,100.	14,847.	
Financing expense 1½ %	74,236.	
Title and recording expense	7,500.	
TOTAL CARRYING CHARGES; FINANCING		229,310.
LEGAL AND ORGANIZATION:		
Legal expense	10,000.	
Organization expense	10,000.	
TOTAL LEGAL AND ORGANIZATION		20,000.
TOTAL ESTIMATED COST (exclusive of land and required construction off the site)		5,499,490.
FAIR MARKET PRICE FOR THIS PARCEL OF LAND IN FEE SIMPLE (from FHA Form 2401-W): ..... square feet @ ..... per sq. ft.		
TOTAL ESTIMATE OF REPLACEMENT COST OF PROPERTY		

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DETERMINATION OF MAXIMUM INSURABLE MORTGAGE

1. Total for all physical improvements, carrying charges, and financing . . . . . $ Not used
2. 90% of total estimated replacement cost of property . . . . . $ 4,949,500
3. Amount based on limitation as to debt service ratio:
   (a) Mortgage interest rate . . . 4 %
   (b) Mortgage insurance premium . . . ½ %
   (c) Mortgage amortization 1st yr. . . . 1½ %
   (d) Sum of above items . . . . . 6 % (d)
   (e) Net income $ 326,798. × 91% = $ 297,386.18 (e)
   (f) Annual special assessments . . $ (f)
   (g) . . . . . $ (g)
   (h) Total of (f) and (g) . . . . . $ (h)
   (i) Item (e) minus Item (h) . . . . . $ 297,386.18 (i)
   (j) Item (i) ÷ Item (d) . . . . . $ 4,956,400.
4. Amount based on limitation of $ per room:
   (a) Family Units 611 × $8100 = $ 4,949,100 (a)
   (b) Field cost dwelling buildings . . . . $ (b)
   (c) Field cost dwelling buildings and accessory buildings . . . . . $ 4,949,100 (c)
   (d) Item (c) ÷ Item (b) = 100 % (d)
   (e) Item (a) × Item (d) . . . . . $ 4,949,100
5. Mortgage amount stated in application (Form 2013W) . . . . . $ 5,000,000
6. 90% of Sponsors Total Estimate of Replacement Cost 4,949,900

MAXIMUM INSURABLE MORTGAGE (Lowest of above amounts) . . . . . $ 4,949,100

ESTIMATED REQUIREMENTS FOR COMPLETION OF THE PROJECT

1. FHA total estimated cost exclusive of land (and exclusive of required construction off the site)		$ 5,498,061
2. Mortgage loan proceeds	$ 4,949,100	
3. Amount for fees to be paid by means other than cash	$	
4. Estimated amount of cash to be escrowed at closing	$ 548,961	
5. Total (to equal the amount of Item 1)		$ 5,498,061

ADDITIONAL REQUIREMENTS

In addition to the above requirements land must be free and clear of encumbrances; additional cash must be escrowed at closing in the event the cash required by the contract documents exceeds the sum of the mortgage and the cash indicated in Item 4 above; cash working capital of $ 74,236.50 is to be escrowed at closing, and provision must be made for off-site requirements estimated to cost $ None (Form 2411W).

ANALYTICAL SUMMARY

Ratio: Mortgage $ 4,949,100 total for all improvements, Carrying Charges and Financing $ 5,498,061 — 92 %
Ratio: Mortgage $ 4,949,100 to estimated Replacement Cost of Property $ 5,499,100 . . . . . 89 %

Exhibit 14

RENTAL SCHEDULE FOR INCOME PRODUCING SPACE DWELLINGS

ROOMS PER UNIT	COMPOSITION OF DWELLING UNITS	NUMBER OF UNITS	UNIT RENT PER MONTH		
*2	LR-DS Comb.		$	$	$
			$	$	$
2½	LR-K-DA		$	$	$
			$	$	$
*3	LR-DS-Comb.-BR		$	$	$
			$	$	$
3	LR-K-BR		$	$	$
			$	$	$
3½	LR-K-DA-BR		$	$	$
			$	$	$
(4	LR-K-DR-BR-Officers	10	$	$ 68.25	$
(4	" " -Airmen	75	$	$ 57.25	$
4	LR-K-2BR		$	$	$
			$	$	$
4½	LR-K-DA-2BR			$	$
				$	$
(5	LR-K-DR-2BR -Officers	90	$	$ 77.25	$
(5	" " -Airmen	162	$	$ 57.25	$
(6	LR-K-DR-3BR- Officers	199	$	$ 89.25	$
(6	" " -Airmen	75	$	$ 67.25	$
			$	$	$
			$	$	$

* Efficiency Living Unit Only

CHECK SERVICES AND EQUIPMENT INCLUDED IN RENT

*[x] Water (~~hot~~ and cold)	[x] Grounds maintenance	[ ] Kitchen exhaust fans
[ ] Space heat	[x] Decorating	[ ] Attic Vent Fan
[ ] Gas to tenant	[x] Laundry facilities-Tubs	[ ] Venetian blinds
[ ] Elec. to tenant	[**] Ranges (gas or elec.)	[ ] Furniture
[x] Janitor service	[**] Refrigerators (gas or elec.)	[ ] Other (specify)

The amounts allocated for items above are shown on project analysis

OTHER INCOME PRODUCING SPACE

TYPE	NUMBER IN PROJECT	NUMBER OF UNITS	UNIT RENT PER MONTH	
GARAGES		$	$	$

[fols. 363-364] FEDERAL HOUSING ADMINISTRATION

Information on Section 608 Rental Projects

Name of Project Owner: Offutt Housing Company, Project No. 103-80001. Address of Principal Office: 918 City National Bank Building, Omaha, Nebraska.

Name and Address of Coroprate Resident Agent, if any: Robert J. Wilson, 918 City National Bank Building, Omaha, Nebraska.

Name, Title, and Address of Representative to whom correspondence should be addressed: Offutt Housing Company, 918 City National Bank Building, Omaha, Nebraska.

Fiscal Year: August 31.

Officers	Directors
(To be completed by Corporate Owners only)	
President Carl C. Wilson	Carl C. Wilson
Vice-Pres. Harland L. Mossman, Jr.	Harland L. Mossman,
Treasurer David J. Beber	Robert J. Wilson
Secretary Robert J. Wilson	
Ass't Treas. Harland L. Mossman, Jr.	

Stockholders

Non-corporate Owners list individual names only)

Name	Number of Shares	Type of Stock
Federal Housing Administration	10	Preferred
Carl C. Wilson, Inc.	25,000	Common

[fol. 365] EXHIBIT 15

(For use under Title VIII)

Mortgage

This Mortgage, made and executed this 1st day of February, A. D. 1951, by and between Offutt Housing Company, a corporation organized and existing under the laws

of Nebraska, having its principal place of business at 918 City National Bank Bldg., Omaha, Nebraska, party of the first part, hereinafter with its successors and assigns called the Mortgagor, and Manufacturers Trust Company, a corporation organized and existing under the laws of New York, having its principal place of business at 55 Broad Street, New York, N. Y., party of the second part, hereinafter with its successors and assigns called the Mortgagee.

Witnesseth: That the said Mortgagor, for and in consideration of the sum of Four Million Nine Hundred Forty-Nine Thousand One Hundred and no/100 Dollars ($4,949,100.00), paid by the Mortgagee, the receipt of which is hereby acknowledged, has Granted and Sold and by these presents does Grant, Bargain, Sell Convey and Confirm unto the Mortgagee, its successors and assigns, forever, the following-described leasehold situated in the — of ——, County of Sarpy, and State of Nebraska, to wit: all right, title, interest and privileges of the mortgagor in and to that certain ground Lease between the Secretary of the Air Force representing the United States of America, and Mortgagor, dated January 18, 1951 and recorded January 31, 1950, in the Office of Register of Deeds of Sarpy County, State of Nebraska, in Book Miscellaneous 14, Page 567, Official Records of said County, upon premises described in the rider hereto attached and made a part hereof with the same force and effect as though fully recited herein.

Mortgagor will not execute or file for record any instrument which imposes a restriction upon the sale or occupancy of the project or any part thereof on the basis of race, color, or creed, or execute any agreement, lease, or conveyance affecting the mortgaged property which imposes any such restriction upon its sale or occupancy, of the Sixth Principal Meridian, containing in all 63.05, more or less, acres according to Government survey;

Together with the privileges and appurtenances to the same belonging, and all of the rents, issues, and profits which may arise or be had therefrom; and

Together with all buildings and improvements of every kind and description now or hereafter erected, or placed thereon, and all fixtures, including but not limited to all gas and electric fixtures, engines and machinery, radiators,

heaters, furnaces, heating equipment, steam and hot-water boilers, stoves, ranges, elevators and motors, bathtubs, sinks, water closets, basins, pipes, faucets and other plumbing and heating fixtures, mantels, refrigerating plant and refrigerators, whether mechanical or otherwise, cooking apparatus and appurtenances, furniture, shades, awnings, screens, blinds and other furnishings; and together with all building materials and equipment now or hereafter delivered to said premises and intended to be installed therein. All articles of personal property owned by the Mortgagor and now or hereafter attached to or used in and about the building or buildings now erected or hereafter to be erected on the lands herein described which are necessary to the complete and comfortable use and occupancy of such building or buildings for the purposes for which they were or are to be erected, including all goods and chattels and personal property as are ever used or furnished in operating a building or the activities conducted therein, similar to the one herein described and referred to, and all renewals or replacements thereof or articles in substitution therefor, whether or not the same are, or shall be attached to said building or buildings in any manner. It is hereby agreed that to the extent permitted by law of the foregoing property and fixtures are to be deemed and held to be a part of and affixed to the realty.

To have and to hold the premises and property above described, with all the appurtenances thereunto belonging unto the Mortgagee, and to its successors and assigns, forever. The Mortgagor represents to, and covenants with, the Mortgagee, that the Mortgagor has good right to sell and convey said premises; that they are free from encumbrance; and that the Mortgagor will warrant and defend the same against the lawful claims of all persons whomsoever; and the said Mortgagor hereby relinquishes all rights of homestead, either in law or in equity, and all other contingent interests of the Mortgagor in and to the above-described premises, the intention being to convey hereby an absolute title, in fee simple, including all rights of homestead, and other rights and interests as aforesaid.

Provided Always, and these presents are executed and delivered upon the following conditions, to wit:

[Vol. 366] That if the Mortgagor shall pay to the Mort-

gagee, or order, the principal sum of Four Million Nine Hundred Forty-Nine Thousand One Hundred and no/100 Dollars ($4,949,100.00), with interest from date at the rate of Four per centum (4%) per annum on the unpaid balance until paid, at the office of Manufacturers Trust Company in New York City, New York, or at such other place as the holder of the note may designate in writing, in monthly installments as follows:

Interest alone payable on the first day of March, 1951, and on the first day of each month thereafter to and including July 1, 1952. Thereafter commencing on the first day of August, 1952, installments of interest and principal shall be paid in the sum of Twenty-Two Thousand Six Hundred Eighty-Three & 37/100 Dollars ($22,683.37) each, such payments to continue monthly thereafter on the first day of each succeeding month until the entire indebtedness has been paid. In any event the balance of principal (if any) remaining unpaid, plus accrued interest shall be due and payable on February 1st, 1985. The installments of interest and principal shall be applied first to interest at the rate of Four percent (4%) upon the principal sum or so much thereof as shall from time to time remain unpaid, and the balance thereof shall be applied on account of principal.

all according to the terms of a certain promissory note of even date herewith:

And shall perform each and every covenant, condition, and agreement herein contained, then these presents shall be void, otherwise to remain in full force and effect.

The Mortgagor in order more fully to protect the security of this mortgage, agrees:

1. To pay said note as herein and in said note provided. Privilege is reserved to pay the debt in whole or in an amount equal to one or more monthly payments on principal next due, on the first day of any month prior to maturity upon at least thirty (30) days prior written notice to the holder. If this debt is paid in

full prior to maturity and while insured under the National Housing Act, all parties liable for payment thereof hereby agree to be jointly and severally bound to pay to the holder hereof the adjusted premium charge referred to in Title VIII; provided that such adjusted premium charge shall not exceed the aggregate amount of premium charges which would have been payable if the mortgage had continued to be insured until maturity and shall be subject to all exceptions contained in said Regulations. The foregoing privileges of prepayment in further expressly limited as follows:

All parties hereto agree that prepayments to the extent of 15% of the original principal amount hereof may be made in any one calendar year without penalty, with the further privilege to prepay the debt in whole or in amounts exceeding in any calendar year 15% of said original principal amount and payment of all FHA insurance premium charges as provided in Section 803 of said Title VIII, provided, however, in the event that the aggregate of all prepayments of principal made in any one calendar year shall exceed 15% of said original principal amount, there shall be paid to the mortgagee, its successors and assigns, as a condition precedent to and as consideration for the privilege of making payments in excess of 15% of said original principal amount in any one year, which shall not be cumulative and, in addition to the amount of the FHA adjusted premium charge as required, the following charge computed on said original principal amount: (1) An amount equal to 3% thereof in the event any such prepayment is made during the first ten years of the term of said mortgage or deed of trust, (2) an amount equal to 2% thereof in the event any such prepayment is made during the second ten years of said term, and (3) an amount equal to 1% thereof in the event any such prepayment is made during the balance of said term.

2. That the Mortgagor, together with and in addition to the monthly payments under the terms of the note secured hereby, will pay to the Mortgagee monthly, beginning on the first day of the first month after the date hereof and of

FHA mortgage insurance premium 5 % × Mortgage $ 4,949,100.	24,745.	
FHA examination fee 0.3% of $ 4,949,100.	14,847.	
Financing expense 1½ %	74,236.	
Title and recording expense	7,500.	
TOTAL CARRYING CHARGES; FINANCING		229,310.
LEGAL AND ORGANIZATION:		
Legal expense	10,000.	
Organization expense	10,000.	
TOTAL LEGAL AND ORGANIZATION		20,000.
TOTAL ESTIMATED COST (exclusive of land and required construction off the site)		5,499,490.
FAIR MARKET PRICE FOR THIS PARCEL OF LAND IN FEE SIMPLE (from FHA Form 2401-W):		
..... square feet @ ..... per sq. ft.		
TOTAL ESTIMATE OF REPLACEMENT COST OF PROPERTY		

I HEREBY CERTIFY That I have read Section 512 (a) of the National Housing Act, as amended; that I have no personal interest, present or prospective, in the property, the proceeds of a mortgage proposed to be secured by the property or the applicant therefor.

Date 1-29-51 (Signed) R. J. [illegible] Valuator

Date 1/29/51 N.T.B. (Approved) (Signed) [illegible]

☒ Chief Valuator. ☐ Deputy for Chief Valuator.

ESTIMATED REQUIREMENTS FOR COMPLETION OF THE PROJECT

1. FHA total estimated cost exclusive of land (and exclusive of required construction off the site)		$5,498,061
2. Mortgage loan proceeds	$4,949,100	
3. Amount for fees to be paid by means other than cash	$	
4. Estimated amount of cash to be escrowed at closing	$548,961	
5. Total (to equal the amount of Item 1)		$5,498,061

ADDITIONAL REQUIREMENTS.

In addition to the above requirements land must be free and clear of encumbrances; additional cash must be escrowed at closing in the event the cash required by the contract documents exceeds the sum of the mortgage and the cash indicated in Item 4 above; cash working capital of $ 74,236.50 is to be escrowed at closing, and provision must be made for off-site requirements estimated to cost $ None (Form 2411W).

ANALYTICAL SUMMARY

Ratio: Mortgage $ 4,949,100 total for all improvements, CARRYING CHARGES and FINANCING $ 5,498,490	92 %
Ratio: Mortgage $ 4,949,100 to estimated Replacement Cost of Property $ 5,499,490	89 %
Ratio: Debt service requirements $ 296,946 to estimated net income $ 326,798	90 %
Amount of mortgage allocable to dwellings only: per family unit, $ 8100; per room,	$ 1684
Estimated Replacement Cost of Property: per family unit, $ 9000; per room, $ 1871	
Ratio: Income from dwellings @ 100% occupancy to all income at 100% occupancy	100 %
Ratio: Total operating expenses and taxes $ 149,988 to gross income expectancy $ 476,786	31 %
Ratio: Debt service requirements $ 296,946 to gross income expectancy $ 476,786	62 %
Point of technical default:	82 %
Point of FHA loss:	70 %

REMARKS:

Date January 24, 1951 (Signed) [signature] Mortgage Credit Examiner.

Date January 24, 1951 (Approved) (Signed) [signature] Chief Mortgage Credit Examiner.
Deputy for Chief Mortgage Credit Examiner.

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* Efficiency Living Unit Only

CHECK SERVICES AND EQUIPMENT INCLUDED IN RENT

*[x] Water (~~hot and~~ cold)	[x] Grounds maintenance	[ ] Kitchen exhaust fans
[ ] Space heat	[x] Decorating	[ ] Attic Vent Fan
[ ] Gas to tenant	[x] Laundry facilities-Tubs	[ ] Venetian blinds
[ ] Elec. to tenant	[**] Ranges (gas or elec.)	[ ] Furniture
[x] Janitor service	[**] Refrigerators (gas or elec.)	[ ] Other (specify)

The amounts allocated for items above are shown on project analysis

OTHER INCOME PRODUCING SPACE

TYPE	NUMBER IN PROJECT	NUMBER OF UNITS @ UNIT RENT PER MONTH		
GARAGES		@ $	@ $	@ $
		@ $	@ $	@ $
STORES		@ $	@ $	@ $
		@ $	@ $	@ $
OFFICES		@ $	@ $	@ $
		@ $	@ $	@ $

NON-REVENUE PRODUCING DWELLING SPACE

ROOMS PER UNIT	COMPOSITION OF UNITS	NO. OF EACH UNIT TYPE	USE (JANITOR - OFFICE - RESIDENT MANAGER - ETC.)	
** Included in rent $4.00 per month				
* At request of U.S. Air Force 25¢ per month per tenant was added and included in rent for a special water plant improvement to be collected by us and paid to U.S. Air Force $140.00 per month.				

I hereby certify that the information contained on Pages 1 and 2 is complete, correct, and in accordance with the owner's records.

OFFUTT HOUSING COMPANY

Date July 29, 1952 NAME By Earl C. Wilson

TITLE President

NOTE Charter or regulatory agreement provisions require: (1) Approval of schedule of first rents prior to leasing or offering for lease any dwelling or store accommodations. This initial rental schedule shall be at a maximum average rental per month fixed by the corporation or project owner and approved by the holders of the preferred stock or Commissioner. (2) Upon approval of the first rents, such accommodations shall be rented at or below the rents so approved and shall not thereafter be changed without prior approval of the holders of the preferred stock or Commissioner.

56096 R. 5/48 NHFA-PBA-Wash., D. C.

PWP's Ex. No. 14
ROY L. PETERSON
COURT REPORTER

each month thereafter until the said Note is fully paid, the following sums:

(a) If and so long as said Note of even date and this mortgage are insured under the provisions of the National Housing Act, an amount sufficient to accumulate in the hands of the Mortgagee one month prior to its due date the annual mortgage insurance premium, in order to provide the Mortgagee with funds to pay such premium to the Federal Housing Commissioner pursuant to Title VIII of the National Housing Act, as amended, and Regulations thereunder.

(b) A sum equal to the ground rents, if any, next due, plus the premiums that will next become due and payable on policies of fire and other hazard insurance covering the premises covered hereby, plus water rates, taxes, and assessments next due on the premises covered hereby (all as estimated by the Mortgagee) less all sums already paid therefor divided by the number of months to elapse before one month prior to the date when such ground rents, premiums, water rates, taxes, and assessments will become delinquent, such sums to be held by the Mortgagee in trust to pay said ground rents, premiums, water rates, taxes, and special assessments.

(c) All payments mentioned in the two preceding subsections of this paragraph and all payments to be made under the note secured hereby shall be added together and the aggregate amount thereof shall be paid by the Mortgagor each month in a single payment to be applied by the Mortgagee to the following items in the order set forth:

(I) premium charges under the Contract of Mortgage Insurance with the Federal Housing Commissioner;

(II) ground rents, taxes, assessments, water rates, fire, and other hazard insurance premiums;

(III) interest on the note secured hereby; and

(IV) amortization of the principal of said note.

Any deficiency in the amount of such aggregate monthly payment shall, unless made good by the Mortgagor

prior to the due date of the next such payment, constitute an event of default under this mortgage.

4. That Mortgagor will pay all ground rents, taxes, assessments, water rates, and other governmental or municipal charges, fines, or impositions, for which provision has not been made by payment as hereinbefore provided, and in default thereof the Mortgagee may pay the same; and that it will promptly deliver the official receipts therefor to the Mortgagee.

5. The Mortgagor will pay all taxes which may be levied upon the Mortgagee's interest in said real estate and improvements, and which may be levied upon this mortgage or the debt secured hereby (but only to the extent that such is not prohibited by law and only to the extent that such will not make this loan usurious), but excluding any income tax, [fol. 367] State or Federal, imposed on Mortgagee, and will file the official receipt showing such payment with the Mortgagee. Upon violation of this undertaking, or if the Mortgagor is prohibited by any law now or hereafter existing from paying the whole or any portion of the aforesaid taxes, or upon the rendering of any court decree prohibiting the payment by the Mortgagor of any such taxes, or if such law or decree provides that any amount so paid by the Mortgagor shall be credited on the mortgage debt, the Mortgagee shall have the right to give ninety days' written notice to the owner of the mortgaged premises, requiring the payment of the mortgage debt. If such notice be given, the said debt shall become due, payable, and collectible at the expiration of said ninety (90) days.

6. That the Mortgagor will keep the improvements, now existing or hereafter erected on the mortgaged property insured against loss by fire and such other hazards, casualties, and contingencies, as may be stipulated by the Commissioner upon the insurance of the mortgage and other hazards as may be required from time to time by the Mortgagee, and all such insurance shall be carried in such companies and be for such periods as may be required by the Mortgagee, and be in an amount which will comply with the co-insurance clause applicable to the location and char-

acter of the property but not less than eighty per centum (80%) of the actual cash value of the insurable improvements and equipment of the property. Such policies shall be in standard form and endorsed with standard mortgagee clause with loss payable to the Mortgagee and the Federal Housing Commissioner as interest may appear, and shall be deposited with the Mortgagee. Payment of premiums to be made as hereinbefore provided. That if the premises covered hereby, or any part thereof, shall be damaged by fire or other hazard against which insurance is held as hereinbefore provided, the amounts paid by any insurance company pursant to the contract of insurance shall, to the extent of the indebtedness then remaining unpaid, be paid to the Mortgagee, and, at its option, may be applied to the debt or released for the repairing or rebuilding of the premises.

7. That all awards of damages in connection with any condemnation for public use of or injury to any of said property are hereby assigned and shall be paid to Mortgagee, who may apply the same to payment of the installments last due under said note, and Mortgagee is hereby authorized, in the name of Mortgagor, to execute and deliver valid aquittances thereof and to appeal from any such award.

8. To commit or suffer no waste of said property, to maintain and keep the buildings, fences, and other improvements to be erected on said premises in good condition and repair and promptly to effect such repairs thereof as Mortgagee may require.

9. Not to permit or suffer, without the written consent of the Mortgagee:

(a) The use of any of said property for any purpose other than that for which the same is now agreed upon to be used.

(b) Any alteration of or addition to the buildings or improvements hereafter constructed in or upon said real property.

10. That if there shall be a default in any of the terms, conditions, or covenants of this mortgage, or the note secured hereby, then any sums owing by the Mortgagor to the Mortgagee shall, at the option of the Mortgagee, be-

come immediately due and payable. The Mortgagee or any holder of this mortgage and the note secured hereby shall then have the right to enter into the possession of the mortgaged premises and collect the rents, issues, and profits thereof. In any action to foreclose, the holder of this mortgage shall be entitled to the appointment of a receiver of the rents and profits of the mortgaged premises as a matter of right and without notice, with power to collect the rents, issues, and profits of said mortgaged premises, due and becoming due during the pendency of such foreclosure suit, such rents and profits being hereby expressly assigned and pledged as additional security for the payment of the indebtedness secured by this mortgage, without regard to the value of the mortgaged premises or the solvency of any person or persons liable for the payment of the mortgage indebtedness. This Mortgagor for itself and any subsequent owner hereby waives any and all defenses to the application for a receiver as above and hereby specifically consents to such appointment without notice, but nothing herein contained is to be construed to deprive the holder of the mortgage of any other right, remedy, or privilege it may now have under the law to have a receiver appointed. The provision for the appointment of a receiver of the rents and profits and the assignment of such rents and profits is made an express condition upon which the loan hereby secured is made.

* * * * * * *

14. That the improvements about to be made upon the premises above described and all plans and specifications comply with all municipal ordinances and regulations made or promulgated by lawful authority, and that the same will upon completion comply with all such municipal ordinances and regulations and with the rules of the Board of Fire Underwriters having jurisdiction. In the event the Mortgagor shall at any time fail to comply with such rules, regulations, and ordinances which are now or may hereafter become applicable to the premises above described, after due notice and demand by the Mortgagee, thereupon the principal sum and all arrears of interest and other charges

provided for herein, shall at the option of the Mortgagee become due and payable.

15. That the funds to be advanced herein are to be used in the construction of certain improvements on the lands herein described, in accordance with a building loan agreement dated February 1, 1951, between the Mortgagor and the Mortgagee, which building loan agreement the Mortgagor covenants to perform.

[fols. 368-370] 17. That if the Mortgagor fails to make any payments of money when the same become due, or fails to conform to and comply with any of the conditions or agreements contained in this mortgage, or the note which it secures, then the entire principal sum and accrued interest shall at once become due and payable, at the election of the Mortgagee; and this mortgage may thereupon be foreclosed immediately for the whole of said money, interest, monthly payments, costs, ground rents, taxes, and the cost of extending the abstract of title from the date of this loan to the time of commencing such foreclosure suit, all advances and interest, and a reasonable attorney's fee, all of which shall be included in the decree of foreclosure; and the contract embodied in this mortgage and the note secured hereby, shall in all respects be governed, construed, and adjudged by the laws of Nebraska, where the same is made.

The covenants herein contained shall bind, and the benefits and advantages shall insure to, the respective successors and assigns of the parties hereto. Whenever used, the singular number shall include the plural and the plural the singular.

The foregoing conditions, all and singular, being performed according to their natural and legal import, this conveyance shall be void and said premises released at the expense of the Mortgagor; otherwise to be and remain in full force and effect.

In Witness Whereof, the said Mortgagor has caused these presents to be signed in its name by its President, attested by its Secretary, and its corporate seal to be hereunto affixed the day and year first above written.

Offutt Housing Company, by Carl C. Wilson, President. (Corporate seal.)

Attest: Robert J. Wilson, Secretary.

In the presence of—Jules O. Hendricks, George R. Pulliam.

STATE OF NEBRASKA,
County of Douglas, ss:

On this 1st day of February, 1951, before me, a Notary Public in and for said County, personally came the above-named Carl C. Wilson President, and Robert J. Wilson, Secretary, of Offutt Housing Company, who are personally known to me to be the identical persons whose names are affixed to the above mortgage as President and Secretary of said corporation and each acknowledged the instrument to be his voluntary act and deed and the voluntary act and deed of said corporation. Witness may hand and Notary seal the date last aforesaid.

My commission expires on the 25th day of August, 1955.
Carl Bolt.

[fol. 371] Rider Attached to and Made Part of Leasehold Mortgage Made the 1st Day of February, 1951, by and Between Offutt Housing Company and Manufacturers Trust Company

To Further Protect the Security of this Mortgage, the Mortgagor covenants and agrees:

1. The Mortgagor covenants and agrees that it will at all times promptle and faithfully keep and perform, or cause to be kept and performed, all the covenants, provisions, agreements and conditions contained in the Ground Lease by the Lessee therein to be kept and performed, and in all respects conform to and comply with the terms and conditions of the Ground Lease, and the Mortgagor further covenants and agrees that it will not do or permit anything to be done the doing of which, or refrain from doing anything, the omission of which, will impair or tend to impair the security of this Mortgage or will be grounds for declaring a forefeiture or termination of the Ground Lease. The Mortgagor also covenants and agrees that it will not renegotiate, modify, extend or in any way alter or attempt to alter the terms of said Lease or waive, excuse, condone or in any way release or discharge the Lessor thereunder of or

from the obligations, covenants, conditions and agreements by said Lessor to be done and performed; and said Mortgagor does by these presents expressly release, relinquish and surrender unto the Mortgagee all its rights, power and authority to renegotiate, amend, modify or alter in any way the terms and provisions of said Lease.

2. The Mortgagee shall have the right to inspect the mortgaged property from time to time at any reasonable hour of the day.

3. The Mortgagor covenants that it will keep books of record and account in which full, true and correct entries will be made of all dealings and transactions relative to the mortgaged property, which books of record and account shall at all reasonable times be open to the inspection of the Mortgagee, its agents or accountants, and the Mortgagor further covenants that it will deliver to the Mortgagee within ninety (90) days after the end of each calendar year hereafter a detailed balance sheet and a detailed statement of income and profit and loss with respect to the mortgaged property for said year, certified by accountants satisfactory to the Mortgagee, or by any Certified Public Accountant licensed by the State of Nebraska.

* * * * * * *

5. That all sums secured hereby shall become due and payable at the option of the Mortgagee, if the Mortgagor fails to give the Mortgagee immediate notice of any default under the Ground Lease or of the receipt by it of any notice of default from the Lessor or if the Trustor fails to furnish to the Mortgagee immediately any and all information which it may request concerning the performance by the Mortgagor of the covenants of the Ground Lease or of this Mortgage, or if the Mortgagor fails to permit forthwith the Mortgagee or its representative or agent at all reasonable time to make investigation or examination concerning such performance. The Mortgagor further covenants and agrees that it will promptly deposit with the Mortgagee (to be held by it until the lien of this Mortgage shall be released) any and all documentary evidence received by it showing compliance by the Mortgagor with the provisions of the Ground Lease and will also deposit with the Mort-

gagee (to be held by it until the lien of this Mortgage shall be released) an exact copy of any notice, communication, plan, specification or other instrument or document received or given by it in any way relating to or affecting the Ground Lease or said property which may concern or affect the estate of the Lessor or the Lessee in or under the Ground Lease or in the real estate thereby demised, and upon the Mortgagors failure so to do, the Mortgagee may, at its option, declare all sums secured hereby due and payable. Provided, however, that Mortgagee shall not declare all sums secured hereby due and payable, for any of the reasons set out in this paragraph 5, until the expiration of a thirty (30) day grace period after default by Mortgagor in the performance of Mortgagor's obligations or any of them, as set out in this paragraph 5.

* * * * * * *

[fol. 372] 9. That the said Ground Lease is now valid and in full force and effect; that all the rent and other charges made payable by the Ground Lease prior to the date hereof have been paid; that all other covenants, terms, provisions, conditions and agreements contained in the Ground Lease to be performed by the Tenant have been observed and performed; that no default exists in respect to the Ground Lease and that the Mortgagor has good right and lawful authority to convey the same in manner and form hereby conveyed.

* * * * * * *

11: That within ten (10) days after demand the Mortgagor shall furnish to the Mortgagee a true list of the names of the subtenants then occupying the mortgaged property, identification of the spaces occupied, the amount of the rental to be paid by each of them, and the terms of the subleases.

* * * * * * *

[fols. 373-374] GEO. F. NICHOLSON

County Clerk of Sarpy County

Papillion, Nebraska

I hereby certify that I am the duly elected County Clerk of the County of Sarpy, Nebraska and that the foregoing and attached photostatic copy is a true copy of the instrument appearing in Mortgage Record Book No. 63 at Page 173 in the Register of Deed's Office, County of Sarpy, Nebraska.

Dated this 20th day of April, 1954.

Geo. F. Nicholson, County Clerk.

[fol. 375] EXHIBIT 16

Limited Assignment of Rents

This agreement, made this 28th day of July, 1953, between Douglas County Bank of Omaha, a Nebraska corporation, Offutt Housing Company, a Nebraska corporation, and Carl C. Wilson, Inc., a Nebraska corporation, Witnesseth that

Whereas, Offutt Housing Company is the owner of 611 housing units located at Offutt Field, Sarpy County, Nebraska, constructed by it under the provisions of the Wherry Act, with said real estate being subject to a FHA mortgage held by the Manufacturers' Trust Company of New York; and

Whereas, in connection with the placing of said mortgage, a commission is payable to the undersigned, Douglas County Bank of Omaha, and to Carl C. Wilson, Inc. dependent upon all payments under said mortgage being made as provided and the mortgage being kept in good standing, and Douglas County Bank of Omaha has heretofore advanced to Carl C. Wilson, Inc. moneys against Carl C. Wilson, Inc.'s interest in said commission and has taken an assignment of such interest; and

Whereas, the July, 1953 payment of $28,771.56 under said mortgage, which became due July 1, 1953, has not

been paid, and said mortgage will be in default if the same is not paid immediately, and the bank is willing to advance the necessary funds to pay the same and future monthly payments on account of said mortgage, plus any monthly reserves required thereby, on condition that the monthly rentals from the project are assigned to it for the sole purpose of securing any such payments by it to be made; and the case position of Offutt Housing Company and Carl C. Wilson, Inc. is such that it would be advantageous to each of them to have the Douglas County Bank of Omaha advance said payments on behalf of Offutt Housing Company:

Now therefore, in consideration of the foregoing and the mutual agreements of the parties hereto, it is agreed between them as follows:

1. Offutt Housing Company hereby assigns to Douglas County Bank of Omaha all rentals from its said housing project at Offutt Field, Sarpy County, Nebraska, commencing with the August, 1953 rentals for the sole and only purpose of securing said bank for any payments to be advanced by it hereunder on account of said FHA mortgage.

2. Douglas County Bank of Omaha hereby appoints Carl C. Wilson, Inc. its agent to collect said monthly rentals and deposit the same in a special checking account to be established in the said bank, hereby reserving the right to change the said agent upon thirty days written notice.

3. Carl C. Wilson, Inc. hereby accepts said appointment and agrees to deposit all rentals from said project, commencing with the August, 1953 rentals, in said checking account for as long as this Agreement remains in effect.

[fol. 376] A certain tract of land situated in the County of Sarpy, State of Nebraska, more particularly described as follows:

* * * * * * *

Together with the right of the Lessee to use, jointly with the Government and others, an access road for the purpose of ingress and egress, described as follows:

* * * * * * *

[fol. 377] 4. Offutt Housing Company and Carl C. Wilson, Inc. hereby jointly and severally authorize and empower said Douglas County Bank of Omaha to, without notice, withdraw from said checking account the amount of the July, 1953 payment on said mortgage to be advanced by it as herein contemplated, and, in addition, sufficient moneys from time to time to cover the amount of the next succeeding monthly payment on said mortgage (including reserve payments), it being the intention of this paragraph to authorize the bank to withdraw from said checking account a sufficient amount to fully reimburse it for all moneys advanced by it hereunder on behalf of Offutt Housing Company, and also to cover any mortgage and reserve payments which the bank may advance or pay on behalf of said housing company during any next succeeding month.

5. The Douglas County Bank of Omaha agrees that any excess rentals which may accumulate in said checking account in excess of the amounts to be withdrawn therefrom by it under the terms of the last preceding paragraph will be released and paid over to Offutt Housing Company from time to time as any such excess may accumulate.

6. This agreement may be terminated by any party on thirty days written notice to the other parties, provided that Douglas County Bank of Omaha has been fully reimbursed by the termination date for all funds advanced by it hereunder.

7. It is understood that this agreement is subject to the terms of said FHA mortgage and of the assignment of rents to the Manufacturers' Trust Company which accompany the same, and that the intendment of this agreement is to supplement and facilitate compliance with said mortgage and assignment of rents.

8. It is further understood that the monthly rentals from said Offutt Housing Company project include payments by tenants on stoves and refrigerators located within the housing units and also gas and electricity charges; and that Carl C. Wilson, Inc. will notify the bank on or about the 15th of each month of the total amount of such stove and refrigerator payments and utility charges, which were included within the rentals deposited for that month; whereupon, the bank will release to Offutt Housing Company such total amount of stove and refrigerator and

utility payments, provided that such amount is then available in said checking account.

Executed in triplicate, the parties hereto binding themselves, their successors and assigns the day and year aforesaid.

Attest: Charles J. Wright, Secretary.
Douglas County Bank of Omaha, By Walter W. Clark, V. P.

Attest: Robert J. Wilson, Secretary.
Offutt Housing Company, by Carl C. Wilson, President.

Attest: Robert J. Wilson, Secretary.
Carl C. Wilson, Inc., By Carl C. Wilson, President.

STATE OF NEBRASKA,
County of Douglas, ss:

On this 28th day of July, 1953, before me a Notary Public [fol. 378] in and for said County, personally came Walter W. Clark to me known to be the Vice Pres. of Douglas County Bank of Omaha, and Carl C. Wilson, to me known to be the President of Offutt Housing Company and Carl C. Wilson, Inc., and each of them acknowledged the execution of the foregoing instrument to be their voluntary act as officers of their respective corporations for the purposes above set forth.

Witness my hand and Notarial Seal the day and year last above set forth.

Regina Nagle, Notary Public.

[fols.379-382] Geo. F. Nicholson

County Clerk of Sarpy County, Papillion, Nebraska

I hereby certify that I am the duly elected County Clerk of the County of Sarpy, Nebraska and that the foregoing is a true copy of the instrument appearing in Miscellaneous Record No. 16 at Page 217 in the Register of Deed's Office, County of Sarpy, Nebraska.

Dated this 20th day of April, 1954.

Geo. F. Nicholson, County Clerk.

Exhibit 22

190A

INSTALMENT PLAN

115

CONDITIONAL SALE CONTRACT

DIVERSIFIED FINANCING

DUPLICATE ORIGINAL—To be filed or recorded according to State Law

Contract Number

By

The undersigned seller hereby sells, and the undersigned purchaser hereby purchases, subject to the terms and conditions hereinafter set forth, the equipment described below or in schedule attached hereto, delivery and acceptance of which in good order is hereby acknowledged by purchaser, viz.:

QUANTITY	NEW OR USED	MAKE	DESCRIPTION OF EQUIPMENT	SERIAL NUMBER ATTACH SEPARATE LIST IF NECESSARY
			The equipment described in an attached list.	

VOLTAGE 115 CURRENT AC CYCLE 60

For a Total Time Price of . . . . . $ 17.22.50

Payable in an amount on or before delivery of . . . . . $

Leaving a Deferred Balance of . . . . . $ 17.22.50

Payable at the office of General Motors Acceptance Corporation to be hereafter designated in instalments of . $ 3.1.27

on the same day of each successive month, or as indicated in schedule of instalments below, and commencing February 15 19 52

The final instalment payable hereunder shall equal the amount of the deferred balance remaining due. Interest is due on instalments after maturity at the highest lawful contract rate, and if this contract be placed with an attorney for collection, 15% of the amount due hereunder shall be paid by the purchaser as attorney's fees, or if prohibited, the amount permitted by law.

Schedule for unequal monthly instalments

$ .....1 Mo. hereafter
$ .....2 Mos. hereafter
$ .....3 Mos. hereafter
$ .....4 Mos. hereafter
$ .....5 Mos. hereafter
$ .....6 Mos. hereafter
$ .....7 Mos. hereafter
$ .....8 Mos. hereafter
$ .....9 Mos. hereafter
$ .....10 Mos. hereafter
$ .....11 Mos. hereafter
$ .....12 Mos. hereafter
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1. Title to said equipment shall not pass to the purchaser until said amount is fully paid in cash.

2. No transfer, removal, extension or assignment of this contract, or any interest hereunder, or loss, damage, injury, or destruction of said equipment shall release the purchaser from his obligation hereunder; the assignee shall be entitled to all the rights of the seller.

3. In the event purchaser defaults on any payment or fails to comply with any condition of this contract or a proceeding in bankruptcy, receivership, or insolvency be instituted against the purchaser or his property, or the seller deems the above equipment in danger of misuse or confiscation, the full amount shall be immediately due and payable. The seller's acceptance, after the full amount may have become immediately due and payable as hereinbefore provided, of any instalment or payment shall not be deemed to alter or affect the purchaser's obligations and/or the seller's rights hereunder with respect to any subsequent payments or default therein.

4. The equipment shall remain strictly personal property whether placed upon a permanent foundation or in what manner affixed or attached to the building or structure in which it may be contained.

5. This contract covers all agreements between the parties and shall not be countermanded.

6. The purchaser shall keep said equipment free of all taxes, liens and encumbrances; shall not use the same illegally or improperly; shall not transfer any interest in this contract or said equipment; shall not remove same from the premises stated herein without written permission of the holder of this contract. Purchaser shall keep said equipment insured against loss by fire to properly protect all interests therein. The proceeds of any insurance whether paid by reason of loss, injury, return premium, or otherwise, shall be applied toward the replacement of the equipment or payment of this obligation at the option of the seller.

7. There are no warranties, expressed or implied, representations, promises or statements in connection with the sale of equipment hereunder except as set forth in manufacturer's current warranty applying to equipment covered by this contract.

8. Time is of the essence of this contract, and in the event the purchaser defaults in complying with the terms hereof, or the seller deems the above equipment in danger of misuse or confiscation, the seller or any sheriff or other officer of the law may take immediate possession of said equipment without demand, including any attachments or accessories thereto, permission by the purchaser after default being unlawful; and for this purpose the seller may enter upon the premises where said equipment may be and remove same. Such repossession shall not affect seller's right, hereby confirmed, to retain all payments made prior thereto by the purchaser hereunder. The seller may resell said equipment so retaken, at public or private sale, without demand for performance, with or without notice to the purchaser (if given, notice by mail to address below said signature) with or without having such equipment at the sale [illegible]

[fol. 383] EXHIBIT 18

Agreement explanatory of Limited Assignment of Rents

Whereas, on July 28, 1953, an instrument designated as "Limited Assignment of Rents" was made and entered into by and between Douglas County Bank of Omaha, a Nebraska corporation, Offutt Housing Company, a Nebraska corporation, and Carl C. Wilson, Inc., a Nebraska corporation, whereby the Offutt Housing Company assigned to the Douglas County Bank of Omaha, all rentals from its housing project at Offutt Field Sarpy County, Nebraska, commencing with the August, 1953, rentals, which assignment recited that it was for the purpose of securing said Bank for any payments advanced by it on account of a FHA mortgage held by the Manufacturers Trust Company of New York, and

Whereas, it was the intent and purpose of the parties to said Limited Assignment of Rents to enable the Offutt Housing Company to keep the aforesaid FHA mortgage in good standing, and

Whereas, the aforesaid Limited Assignment of Rents was made subject to the terms of the aforesaid FHA mortgage and the assignment of rents to the Manufacturers Trust Company in connection therewith and accompanying the same, and whereas it was the intendment of said Limited Assignment of Rents to supplement and facilitate compliance with the terms of the aforesaid FHA mortgage and assignment of rents, and

Whereas, it is desired by the parties to said Limited Assignment of Rents to set out in specific order of payment the distributions to be made from rentals from the Offutt Housing Company deposited with the Douglas County Bank of Omaha pursuant to said assignment of rents,

Now, therefore, it is hereby agreed by and between the parties hereto that from the monthly rentals of the Offutt Housing Company deposited with the Douglas County Bank of Omaha payment or distribution shall be made in the following order of priority to the extent of available funds from such monthly rentals:

1. To payment to the Douglas County Bank of Omaha for any funds advanced or loaned, or which

may hereafter be advanced or loaned, the proceeds of which were used to make or apply upon the monthly payment, including reserve payments, to the Manufacturers Trust Company upon the principal, interest, and required reserves on the aforesaid real estate mortgage held by the Manufacturers Trust Company, and also to reimburse the Douglas County Bank of Omaha for any funds advanced or loaned, the proceeds of which were used for any of the purposes hereinafter stated.

2. To release to the Offutt Housing Company for the Omaha Public Power District and the Peoples Natural Gas Company, not to exceed $2342.29 each month for electricity and gas furnished to the Offutt Housing Company.

[fol. 384] 3. To release to the Offutt Housing Company for the First National Bank of Omaha and for General Motors Acceptance Corporation, the sum of $1355.03 and $2591.64, respectively each month for monthly installments due them, in connection with the financing of stoves, refrigerators, washers and driers, provided that in the event the monthly installment due either the First National Bank of Omaha or General Motors Acceptance Corporation is less than the amount herein stated, the amount released shall in no event exceed the monthly installments due or the amount herein stated, whichever is less.

4. After payment or distribution of items provided in the three paragraphs immediately preceding in the order of priority stated, there shall be set aside and held by the Douglas County Bank of Omaha, from the remainder of the deposits of rental each month in the Douglas County Bank of Omaha, the sum of $3000.00 each month as a reserve for the next succeeding monthly payment, including reserve payments, which shall be due to the Manufacturers Trust Company on the first of the next succeeding month, until such time as this reserve, held by the Douglas County Bank of Omaha, reaches the sum of $15,000.00.

5. From the remainder of monthly deposits of rental in the Douglas County Bank of Omaha, there shall be distributed to Offutt Housing Company, upon its written statement that the amount is owing by the Offutt

Housing Company for the purposes hereinafter set forth, not to exceed the following amounts:

a. $500.00 per month for removal of garbage and trash.

b. $178.20 per month for sewage disposal expense or assessment.

c. $540.96 per month for water supplied.

6. There shall next be distributed to the Offutt Housing Company upon its written statement that the amount is owing for its pay roll, pay roll taxes and necessary repairs not to exceed $3032.80 per month.

7. Until such time as the reserve held by the Douglas [fol. 385] County Bank of Omaha under Item 4 above and under this Item 7 reaches the sum of $15,000.00, there shall be held from any remainder of the monthly deposits of rental in the Douglas County Bank of Omaha, after payment or distribution of Items numbered 1 to 6 inclusive as above set forth, in the order of priority stated, a reserve for the next succeeding monthly payment, including reserve payments, which shall be due to the Manufacturers Trust Company on the first day of the next succeeding month.

8. Any undistributed funds from accumulated monthly rentals then remaining on deposit shall be released to the Offutt Housing Company, or distributed to such person, firm or corporation as it may direct, provided, however, that the Douglas County Bank of Omaha shall not be called upon to disburse any such accumulation to more than two persons, firms, or corporations.

* * * * * * *

[fols. 386-393] In Witness Whereof the parties have caused this Agreement to be executed in triplicate this — day of October, 1953.

Douglas County Bank of Omaha, by —— ——.

Attest: —— ——

Offutt Housing Company, By —— ——

Attest: —— ——

Carl C. Wilson, Inc., By —— ——

Attest: —— ——

[fol. 394] EXHIBIT 21

Omaha Chamber of Commerce to United States of America, W. D. $2.50 Pd.

Filed April 12, 1950 at 4:40 o'clock P. M. B— Dexter, County Clerk.

WARRANTY DEED

Know all men by these presents, That Omaha Chamber of Commerce, a corporation, in consideration of One and no/100 ($1.00) Dollars in hand paid, does hereby grant, bargain, sell, convey and confirm unto the United States of America the following described real estate, situated in the County of Sarpy and State of Nebraska, to-wit:

The following described land located in the Southeast Quarter of Section 35 and the Southwest Quarter of Section 36, all in Township 14, Range 13, East of the 6th P.M., in Sarpy County, Neraska, to-wit: Commencing at a point 6.75 chains East of the Southwest corner of the Southeast Quarter of said Section 35; thence north 1150 feet; thence East 2644.5 feet to a point 65 feet North of the Northeast corner of Lot 6B owned by Louis Svoboda, thence South 65 feet; thence West 260 feet along the North line of said Svoboda tract; thence South 360 feet along the West line of said Svoboda tract; thence West 915 feet along the North lines of Lots 6C and 12B owned by U. S. A.; thence South 725 feet to the South line of said Section 35; thence West 1469.5 feet to place of beginning, subject to existing lawful highways, and any rights for pipeline under Easement to Missouri Valley Pipe Line Company of Nebraska dated April 29, 1932, and recorded in Book 8 and Page 303 of Miscellaneous Records.

[fols. 395-396] together with all the tenements, herditaments and appurtenances to the same belonging, and all the estate, title, claim or demand whatsoever of the said Omaha Chamber of Commerce, a corporation, of, in or to the same, or any part thereof, and free and clear of all encumbrances and taxes now due and payable.

To have and to hold the above described premises, with the appurtenances, unto the said the United States of America and to its assigns forever, and the said grantor for itself and its successors does covenant with said the United States of America, and with its assigns, that it is lawfully seized of said premises, that they are free from encumbrance, and that it will and its successors shall warrant and defend the same unto the said the United States of America and its assigns forever against the lawful claims of all persons whomsoever.

In Witness Whereof, the said Omaha Chamber of Commerce, a corporation, has hereunto caused its corporate seal to be affixed and these presents to be signed this 21st day of October, 1949.

Omaha Chamber of Commerce, a Corporation, by Charles S. Reed, President. (Corporate Seal.)

Attest: Ernest Zschau, Secretary.

In presence of: Russell C. Anderson, Robert C. Fisk, Omaha Chamber of Commerce, Omaha, Neb.

[fols. 397-398] Clerk's Certificate to foregoing paper omitted in printing.

(Here follow 2 Photolithographs, side folios, fols. 399, 400)

VOLTAGE 115 CURRENT AC CYCLE 60

For a Total Time Price of . . . . . $ 17.22.50

Payable in an amount on or before delivery of . . . . . $

Leaving a Deferred Balance of . . . . . $ 17.22.50

Payable at the office of General Motors Acceptance Corporation to be hereafter designated in instalments of . $ 3.4.27

on the same day of each successive month, or as indicated in schedule of instalments below, and commencing February 15 19 52

The final instalment payable hereunder shall equal the amount of the deferred balance remaining due. Interest is due on instalments after maturity at the highest lawful contract rate, and if this contract be placed with an attorney for collection, 15% of the amount due hereunder shall be paid by the purchaser as attorney's fees, or if prohibited, the amount permitted by law.

Schedule for unequal monthly instalments

$ .....1 Mo. hereafter
$ .....2 Mos. hereafter
$ .....3 Mos. hereafter
$ .....4 Mos. hereafter
$ .....5 Mos. hereafter
$ .....6 Mos. hereafter
$ .....7 Mos. hereafter
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1. Title to said equipment shall not pass to the purchaser until said amount is fully paid in cash.

2. No transfer, removal, conversion or assignment of this contract, or any interest hereunder, or loss, damage, injury, or destruction of said equipment shall release the purchaser from his obligation hereunder; the assignee shall be entitled to all the rights of the seller.

3. In the event purchaser defaults on any payment or fails to comply with any condition of this contract or a proceeding in bankruptcy, receivership, or insolvency be instituted against the purchaser or his property, or the seller deems the above equipment in danger of seizure or confiscation, the full amount shall be immediately due and payable. The seller's acceptance, after the full amount may have become immediately due and payable as hereinbefore provided, of any instalment or payment shall not be deemed to alter or prevent the purchaser's obligations and/or the seller's rights hereunder with respect to any subsequent payments or default therein.

4. The equipment shall remain strictly personal property whether placed upon a permanent foundation or in what manner affixed or attached to the building or structure in which it may be contained.

5. This contract covers all agreements between the parties and shall not be countermanded.

6. The purchaser shall keep said equipment free of all taxes, liens and encumbrances; shall not use the same illegally or improperly; shall not transfer any interest in this contract or said equipment; shall not remove same from the premises stated herein without written permission of the holder of this contract. Purchaser shall keep said equipment insured against loss by fire to properly protect all interests thereon. The proceeds of any insurance whether paid by reason of loss, injury, return premium, or otherwise, shall be applied toward the replacement of the equipment or payment of this obligation at the option of the seller.

7. There are no warranties, expressed or implied, representations, promises or statements in connection with the sale of equipment hereunder except as set forth in manufacturer's current warranty applying to equipment covered by this contract.

8. Time is of the essence of this contract, and in the event the purchaser defaults in complying with the terms hereof, or the seller deems the above equipment in danger of seizure or confiscation, the seller or any sheriff or other officer of the law may take immediate possession of said equipment without demand, including any attachments or accessories thereto, possession by the purchaser after default being unlawful; and for this purpose the seller may enter upon the premises where said equipment may be and remove same. Such repossession shall not affect seller's right, hereby confirmed, to retain all payments made prior thereto by the purchaser hereunder. The seller may resell said equipment, so retaken, at public or private sale, without demand for performance, with or without notice to the purchaser (if given, notice by mail to address below being sufficient) with or without having such equipment at the place of sale, and upon such terms and in such manner as the seller may determine; the seller may bid at any public sale. From the proceeds of any such sale, the seller shall deduct all expenses for retaking, repairing and selling such equipment, including a reasonable attorney's fee. The balance thereof shall be applied to the amount due; any surplus shall be paid over to the purchaser; in case of deficiency the purchaser shall pay the same with interest.

9. Purchaser hereby waives the right to remove any legal action from the court originally acquiring jurisdiction.

Equipment installed at Offutt Wherry Project
Street City County State

Executed in quadruplicate, one copy of which was delivered to and receipt thereof acknowledged by the purchaser at the time of the execution hereof this 16th day of January, 19 52.

(Do not date on Sunday)

Purchaser Sign Here: Carl C Wilson — By Carl C Wilson
(Purchaser's Signature) (If Corp., Co., Part.) (Title) (Street) (Town) (State)

Seller Sign Here: Mayer Applebaum — By [illegible]
(If Corp., Co., Part.) (Title) (Town) (State)

Harold Chesler (Witness) SIGN ON DOTS (Witness)

☞ In States where acknowledgment or affidavit is necessary for filing or recording, Notary Public will insert necessary acknowledgment or affidavit on reverse hereof.

GMAC 10510-1024-2-49 (For use in all states except Colo., Ind., La., Maryland, Mass., Mich., Mo., Ohio, Penn., Washington, Wis.) Printed in U.S.A.

For Use in Ariz., Del., N. J., N. Y., S. D., W. Va.

The machines bearing the following serial numbers and included in the within contract will be installed in and annexed to the realty described below: Serial Nos.:

REALTY

Building located at No. .....

Street .....

City ..... State .....

Being section No. .....

Block .....

(Section and Block are to be filled in where the property is to be installed in cities or counties where the block system for recording and indexing conveyance is in use.)

.....
(Seller's Signature)

By .....
(If Corp., Co., Part.) (Title)

.....
(Purchaser's Signature)

By .....
(If Corp., Co., Part.) (Title)

400

The machines bearing the following serial numbers and included in the within contract will be installed in and annexed to the realty described below: Serial Nos.:

REALTY

Building located at No. .....

Street .....

City ..... State .....

Being section No. .....

Block .....

(Section and Block are to be filled in where the property is to be installed in cities or counties where the block system for recording and indexing conveyance is in use.)

.....
(Seller's Signature)

.....
(If Corp., Co., Part.) (Title)

.....
(Purchaser's Signature)

.....
(If Corp., Co., Part.) (Title)

☛ In states where acknowledgment or affidavit is necessary for filing or recording, Notary Public will insert necessary acknowledgment or affidavit in this space.

4293

INSTALMENT PLAN

CONDITIONAL SALE CONTRACT

FROM

TO

The within Conditional Sale Contract was
{filed / recorded this 16 day of Jan A. D. 1952
at 8:00 o'clock A M. by me, clerk
(Or Other Title)
of Surrey
State of N.C.
Surry Co. Clk.
(Signature of Official and Title)

5-0 Pd.
G.M.A.C.

ASSIGNMENT TO GENERAL MOTORS ACCEPTANCE CORPORATION

For value received, the undersigned does hereby sell, assign, and transfer to the General Motors Acceptance Corporation his, its or their right, title and interest in and to the within contract and the property covered thereby and authorizes said General Motors Acceptance Corporation to do every act and thing necessary to collect and discharge the same.

Mayor Appliance Co.
(Seller)

By .....
(If Corp., Co., Part.) (Title)

1805

[fols. 422-423] Clerk's Certificate to foregoing paper omitted in printing.

[fols. 424-429] CLERK'S NOTE RE EXHIBIT 26

Conditional sale contract dated February 11, 1952 and filed with the County Clerk of Sarpy County on February 21, 1952, on the same form and between the same parties as Exhibit 22, for total time price of $15,638.00, covering equipment consisting of 10 refrigerators, 15 washers and 131 gas ranges. Omitted in printing.

[fol. 430] Clerk's Certificate to foregoing paper omitted in printing.

[fols. 431-433] CLERK'S NOTE RE EXHIBIT 27

Chattel mortgage dated April 18, 1952 and filed with the County Clerk of Sarpy County on April 8, 1952 on the same form and between the same parties as Exhibit 24, covering 23 dryers for the amount of $4,447.63—Omitted in printing.

[fol. 434] Clerk's Certificate to foregoing paper omitted in printing.

[fols. 435-440] CLERK'S NOTE RE EXHIBIT 28

Conditional sale contract dated March 10, 1952 and filed with the County Clerk of Sarpy County on March 24, 1952, on the same form and between the same parties as Exhibit 22 for total time price of $13,294.00 covering equipment consisting of 19 refrigerators, 15 washers and 72 gas ranges. —Omitted in printing.

[fol. 441] Clerk's Certificate to foregoing paper omitted in printing.

[fols. 401-403] List describing 40 refrigerators, 16 washers and 74 gas dryers (omitted in printing).

[fols. 404-405] Clerk's Certificate to foregoing paper omitted in printing.

[fols. 406-410] CLERK'S NOTE RE EXHIBIT 23

Conditional sale contract dated December 7, 1951 and filed with the County Clerk of Sarpy County on January 16, 1952, on the same form and between the same parties as Exhibit 22, for total time price of $16,226.00, covering equipment consisting of 63 refrigerators, 2 washers and 64 gas dryers omitted in printing.

[fol. 411] Clerk's Certificate to foregoing paper omitted in printing.

[fols. 412-414] CLERK'S NOTE RE EXHIBIT 24

Chattel mortgage dated January 21, 1952 and filed with the County Clerk of Sarpy County on January 8, 1952, on the same form and between the same parties as Exhibit 25, covering 45 gas dryers for the amount of $8,701.86 omitted in printing.

[fols. 415-416] Clerk's Certificate to foregoing paper omitted in printing.

(Here follow 2 Photolithographs, side folios 417, 418-421)

1921

Exhibit 25

[redacted]

64—CHATTEL MORTGAGE

The Huffman General Supply House, Lincoln, Nebr.

130

KNOW ALL MEN BY THESE PRESENTS:

THAT OMAHA BOWLING COMPANY, A CORPORATION

party of the first part, in consideration of the sum of thirty-two thousand seven hundred thirty five and 20/100 DOLLARS ($32,735.20)

of the County of DOUGLAS and State of NEBRASKA

to it in hand paid by The First National Bank of Omaha

party of the second part, the receipt whereof is hereby acknowledged has bargained and sold and by these presents do grant and convey unto the said party of the second part, and its assigns, the following goods and chattels, to-wit: as shown on Exhibit "A" attached hereto and made a part hereof

to have and to hold the same forever and the said mortgagor does solemnly declare and represent unto the said mortgagee that it is lawfully possessed of the said goods and chattels as own property; that the same are free and clear from all encumbrances, in possession on [redacted], for the purpose of obtaining the above money. And the said party of the first part will forever warrant and defend the same against all persons whomsoever. Upon condition, however, that if the said party of the first part shall pay to the said party of the second part, its [redacted], assigns, [redacted] promissory note of even date herewith and described as follows:

One for $32,735.20 Dollars, payable March 21, 19 26

1921

STATE OF NEBRASKA }
DOUGLAS County } ss.

On this 31st day of January, A. D. 1922, before me, the undersigned Charles S. Reed a Notary Public, duly commissioned and qualified for and residing in said county, personally came Carl G. Wilson, president of CITIES SERVICE COMPANY, A CORPORATION

to me known to be the identical person whose name is affixed to the foregoing instrument as grantor and acknowledged the same to be his voluntary act and deed and the voluntary act and deed of said Cities Service Company.

Witness my hand and Notarial Seal the day and year last above written.

s/ Charles S. Reed Notary Public

My commission expires the day of 19

STATE OF Nebraska }
Douglas County } ss.

I, A. L. Wallin, a Notary Public within and for said County, hereby certify that the foregoing is a true and correct copy of a chattel mortgage this day executed between the within named parties.

Witness my hand and Notarial Seal the 25 day of January 1952

A. L. Wallin Notary Public

My commission expires the 19 day of February 19 52

FOR VALUE RECEIVED, I hereby sell, assign, transfer and set over to

the within mortgage and not accompanying the same and authorize to collect and discharge the same.

, 19

19

Know All Men by These Presents:

That

does hereby acknowledge satisfaction and payment in full of the within Chattel Mortgage, and do hereby release the same and all right, title and interest in and to the goods and chattels therein described, and the recorder of County, is hereby authorized to satisfy same and surrender copy thereof on file in this office.

county treasurer thereof have been made parties defendant. Rothwell v. Knox County, 62 Neb. 50, 86 N. W. 903; Y. M. C. A. of Omaha v. Douglas County, 60 Neb. 642, 83 N. W. 924, 52 L. R. A. 123. See, also, 28 Am. Jur., Injunctions, s. 275, p. 450.

In 1949 Congress enacted Chapter 403, Public Law 211, generally referred to as the Wherry Housing Act. As amended, it now appears as Title 12, U. S. C. A., sections 1748 to 1748i. The primary purpose of the legislation was to procure the construction, operation, and maintenance by private industry of adequate housing facilities for rental to civilian and military personnel of the army, navy, and air force. The main impetus for such construction was supplied by provisions of the act which authorize the Federal Housing Commissioner, after appropriate certification of necessity as a permanent part of a military establishment with no intention to substantially curtail activities thereat, to insure a first mortgage on real estate in fee simple or on a leasehold for an amount generally not to exceed five million dollars, and not to exceed 90 percent of the replacement cost of the property or project when completed.

Section 1748d, insofar as important here, provides that: "Whenever the Secretary of the * * * Air Force determines that it is desirable to lease real property within the meaning of sections 626s-3 to 626s-6 of Title 5, * * * to effectuate the purposes of this subchapter, the Secretary concerned is authorized to lease such property under the authority of sections 626-s-3 to 626s-6 of Title 5, * * * upon such terms and conditions as in his opinion will best serve the national interest without regard to the limitations imposed by said sections in respect to the term or duration [fol. 454] of the lease, and the power vested in the Secretary of the Department concerned to revoke any lease made pursuant to said sections in the event of a national emergency declared by the President shall not apply. Whenever the Secretary of the * * * Air Force determines it to be in the interest of national defense, he is authorized to sell, transfer, and convey at fair value (as determined by him), for use under this subchapter; all or any right, title, and interest in any real property under his jurisdiction, *notwithstanding any limitations or*

*requirements of law with respect to the use or disposition of such property. The authority conferred by this section shall be in addition to and not in derogation of any other power or authority of the Secretary of the * * * Air Force.''* (Italics supplied.)

In that connection, section 1748f, also provides: ''Nothing in this subchapter shall be construed to exempt any real property acquired and held by the Commissioner under this title from taxation by any State or political subdivision thereof, to the same extent, according to its value, as other real property is taxed.'' Such section is not controlling under the factual situation presented in the case at bar, but it does have application, to be considered as a circumstance in connection with others, indicating the intent of Congress that such housing projects should in any event bear their just proportion of state and local taxation.

Further, however, section 626s-6 of Title 5, specifically referred to and incorporated in Title 12, section 1748d, provides: ''The lessee's interest, made or created pursuant to the provisions of sections 626s-3 to 626s-6 of this title, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of said sections shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated.'' The first sentence of such section specifically makes lessee's interest [fol. 455] subject to state and local taxation. However, the latter sentence has application only in the event that Congress should subsequently consent to taxation of the interest of the government in addition to the interest of the lessee. In that connection, as stated in Meade Heights v. Tax Commission of Maryland, 202 Md. 20, 95 A. 2d 280: ''As we read this provision, it called for renegotiation only in the event that Congress should consent to taxation of the government's interest in addition to that of the lessee, which is recognized as fully taxable as of the date of execution.'' As hereinafter observed, section 8 of plaintiff's lease involved herein so recognized that construction.

Only plaintiff lessee's interest in the housing project,

[fols. 442-444] CLERK'S NOTE RE EXHIBIT 29

Chattel mortgage dated March 31, 1952 and filed with the County Clerk of Sarpy County on April 3, 1952, on the same form and between the same parties as Exhibit 24, covering 9 dryers for the amount of $1,762.48.—Omitted in printing.

[fols. 445-446] Clerk's Certificate to foregoing paper omitted in printing.

[fols. 447-448] SUPREME COURT OF NEBRASKA, JANUARY TERM, A. D. 1955, MAY 6

OFFUTT HOUSING COMPANY, a Corporation, Appellee

v.

COUNTY OF SARPY, et al., Appellants

Appeal from the District Court of Sarpy County. No. 33658

JUDGMENT—May 6, 1955

This cause coming on to be heard upon appeal from the district court of Sarpy County, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds error apparent in the record of the proceedings and judgment of said district court in determining that a 1952 tax levy and assessment made by defendant county upon plaintiff's personal property located within the Offutt Air Force Base was void and in enjoining the collection thereof and permanently enjoining any levy and assessment of taxes thereon. It is, therefore, considered, ordered and adjudged that said judgment of the district court be, and it hereby is, reversed and the cause is remanded with directions to render judgment against plaintiff and for defendants in conformity with the opinion of this court this day filed herein; that appellants recover of and from appellee their costs herein expended, taxed at $107.90; for all of which execution is hereby awarded, and that a mandate issue accordingly.

[fol. 449] IN THE SUPREME COURT OF NEBRASKA

OFFUTT HOUSING COMPANY

v.

COUNTY OF SARPY

OPINION—May 6, 1955

1. The levy, assessment, and collection of taxes which are demonstrably void for want of jurisdiction or authority to impose the same may be enjoined.

2. Generally, the state's immunity from suit in its own courts without its consent is unaffected by declaratory judgment statutes, but such an action may be maintained under statutes which permit actions against the state.

3. By the enactment of Title 12, U. S. C. A., section 1748d, and other statutes in pari materia therewith, the Congress of the United States has re-ceded to the state the power and authority to tax a lessee's interest in a housing project located on real property owned by the government of the United States which has been leased by it to private industry for the construction, maintenance, operation, and rental of military housing units by the lessee for its own use and profit.

4. The meaning of the words "public lands" varies in different statutes enacted for different purposes, and they should be given such meaning in each as comports with the intention of the Legislature in their use.

5. The term "leased public lands" as used in section 77-1209, R. R. S. 1943, for the purposes of taxation, means "lands belonging to the public, which have been leased as authorized by law."

[fol. 450] 6. Also, the words "owner of such improvements" as used in section 77-1209, R. R. S. 1943, for purposes of taxation, include "any lessee who has the dominion or control thereover for his own use and profit during the useful life thereof."

[fol. 451] Heard before Simmons, C. J., Carter, Messmore, Yeager, Chappell, Wenke, and Boslaugh, JJ.

CHAPPELL, J.:

Plaintiff, Offutt Housing Company, a corporation, brought this action against defendants, County of Sarpy and Robert M. Eby, its county treasurer, seeking a declaratory judgment determining that a 1952 tax levy and assessment made by the county upon plaintiff's personal property located within the Offutt Air Force Base was void; to enjoin collection thereof; and to permanently enjoin any levy and assessment of taxes thereon. After trial upon the merits, a judgment was rendered which found and adjudged the issues generally in favor of plaintiff and against defendants, and awarded the relief sought by plaintiff. Defendants' motion for new trial was overruled and they appealed. Numerous erro-s were assigned, the effect of which was to assert that the judgment was not sustained by the evidence but was contrary thereto and contrary to law. We sustain the assignments.

At the outset we are met with defendants' contention that by reason of section 77-1727, R. R. S. 1943, plaintiff could not maintain injunction. In Hemple v. City of Hastings, 79 Neb. 723, 113 N. W. 187, it is said, after referring to cited cases and such section: "It was settled that, where a tax is void, i. e., where there is no tax which the plaintiff is in equity bound to pay, he may invoke the aid of a court of equity to protect his rights by injunction, notwithstanding such provision. Earl v. Duras, 13 Neb. 234; Burlington & M. R. R. Co. v. Cass County, 16 Neb. 136; Touzalin v. City of Omaha, 25 Neb. 817; Bellevue Improvement Co. v. Village of Bellevue, 39 Neb. 876." Other comparable Nebraska cases too numerous to cite here are cited and comprehensively discussed in Mid-Continent Airlines v. Nebraska State Board of Equalization & Assessment, 105 F. Supp. 188. As indicated therein, this court has uniformly upheld the right to enjoin taxes which are demonstrably void for [fol. 452] want of jurisdiction or authority to impose the same, as distinguished from those which are not void but simply irregular or erroneous. We conclude that the remedy

of injunction is available, provided the evidence and applicable law warrants its employment.

Relying solely upon section 25-21,159, R. R. S. 1943, defendants also argued that the state was a necessary party defendant, thus there was a defect of parties. We conclude that the contention has no merit. No claim is made in this case that any statute is unconstitutional, requiring opportunity for the Attorney General to be heard. As stated in Northwestern Mutual Life Ins. Co. v. Nordhues, 129 Neb. 379, 261 N. W. 687: "Section 22, art. V of the Constitution, provides: 'The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought.' Under this provision no suit can ordinarily be maintained unless authorized by legislative provision. The state cannot be sued in its own courts without its consent. State v. Mortensen, 69 Neb. 376; McShane v. Murray, 106 Neb. 512; McNeel v. State, 120 Neb. 674; Eidenmiller v. State, 120 Neb. 430."

Section 24-319, R. R. S. 1943, waived that prerogative in some respects, but this action does not come within its purview. It has been held that: "Generally, an action for a declaratory judgment cannot be maintained against the state without its consent, the state's immunity from suit being held unaffected by declaratory judgment statutes; but such an action may be maintained under statutes permitting various actions against the state." 81 C. J. S., States, s. 214, p. 1304, and authorities cited. It has also been held that: "Ordinarily, general rules as to proper and necessary parties in civil actions apply in taxpayers' suits." 20 C. J. S., Counties, s. 291, p. 1244.

On the other hand, as provided in section 23-101, R. R. S. 1943: "Each county, established in this state * * * shall be a body politic and corporate * * * and by that name may sue and be sued, plead and shall be impleaded, defend and be defended against, in any court [fol. 453] having jurisdiction of the subject matter, either in law or equity, or other place where justice shall be administered." No exception thereto is operative herein. This court has uniformly entertained jurisdiction in cases brought to enjoin the collection of void taxes wherein only the county in which the property is located and the

to have and to hold the same forever and the said mortgagor do solemnly declare and represent unto the said mortgagee that [redacted] lawfully possessed of the said goods and chattels as [redacted] own property; that the same are free and clear from all encumbrances, in [redacted] possession on [redacted], for the purpose of obtaining the above money. And the said party of the first part will forever warrant and defend the same against all persons whomsoever. Upon condition, however, that if the said party of the first part shall pay to the said party of the second part, [redacted], assigns, [redacted] promissory note of even date herewith and described as follows:

One for	$32,733.30	Dollars, payable March 21	, 19 26
One for		Dollars, payable	, 19
One for		Dollars, payable	, 19
One for		Dollars, payable	, 19
One for		Dollars, payable	, 19

with interest [redacted], according to the tenor thereof, then these presents to be void, otherwise in full force.

And the said party of the first part do hereby covenant and agree to and with the said party of the second part, that in case of default made in payment of the above mentioned promissory note or any part thereof or if the said party of the first part do not take proper care of said property, or if said party of the second part shall at any time deem himself or themselves insecure, or in case any of said first party attempting or permitting an attempt to injure or dispose of, or remove from said County of [redacted], the aforesaid goods and chattels or any part thereof, then and in that case it shall be lawful for the said mortgagee or assigns, in person or by agent, to take immediate possession of said goods and chattels wherever found, the possession of these presents being sufficient authority therefor, and to sell the same at public or private sale, or so much thereof as shall be sufficient to pay the amount due, or to become due, as the case may be, with unliquidated damages not to exceed ten per cent of principal and interest and all reasonable costs pertaining to the taking, keeping, advertising and selling of said property, the money remaining after paying sums, if any, to be paid on demand to the said party of the first part.

Said sale to take place at Bellevue, County of Sarpy and State of Nebraska, after giving twenty days notice of such sale by advertisement thereof in some newspaper published in said county. And the said first party hereby authorizes the person conducting said sale to adjourn the same, if deemed in his opinion necessary, from time to time until said property be sold and to give a bill of sale to the purchaser thereof which shall be conclusive as to the regularity of all proceedings connected herewith and convey absolutely all right and title of said first party therein.

Witness our hand and Seal this 21st day of January, 19 [illegible]2

SEAL

In Presence of

ATTEST

s/ John Wilson

SECRETARY

OTTOT BOBBIN COMPANY

By s/ Carl C. Wilson

President

No. 42981 $

Due ..... 19....

CHATTEL MORTGAGE

.....

.....

TO

.....

.....

.....

STATE OF Nebr
Sarpy County } ss.

This instrument was filed in my office on the
24 day of Jan, 19 52
at the hour of 8 o'clock A M., and duly
indexed according to law.

No.....

Ester Stanchfield
County Clerk.

.....
Deputy

County.

The Huffman General Supply House, Lincoln, Nebr

Ester Stanchfield

418 - 421

.....

.....

.....

together with the fixtures thereof and its personal property used therein, is involved in this case. In other words, contrary to plaintiff's contention, this is not a case where the county has attempted to tax government property, but rather has taxed plaintiff's private property located on an air force base wherein, as heretofore and hereinafter observed, the right to do so was specifically receded by the Congress of the United States.

The facts are not in dispute. Plaintiff is a perpetual private Nebraska corporation, organized December 22, 1950, by one Carl C. Wilson and two other persons living in Omaha. Its authorized capital stock was $800,000, consisting of 80,000 shares, having a par value of $10 per share. Ten such shares were designated as "Preferred Stock," The rest was "Common Stock." Its principal place of business was designated as in Omaha. The general nature of its business was to provide housing for rent or sale, to acquire any real estate or interest or right therein, or appurtenances thereto, and any and all personal property in connection therewith; to improve, operate, and sell, convey, assign, mortgage, or lease any real estate and personal property; to borrow money and issue evidence of indebtedness in furtherance of any and all of the objects of its business, and to secure same by mortgage, deed of trust, pledge, or other lien; and "To [fol. 456] apply for and obtain or cause to be obtained from the Federal Housing Commissioner a contract or contracts of mortgage insurance pursuant to the provisions of the National Housing Act as amended, covering bonds, notes and other evidences of indebtedness issued by this corporation and any indenture of mortgage or deed of trust securing the same. So long as any property of this corporation is encumbered by a mortgage or deed of trust insured by the Federal Housing Commissioner it shall engage in no business other than the construction and operation of a Rental Housing Project or projects."

Carl C. Wilson is president of plaintiff corporation. He is also president of another private corporation, called "Carl C. Wilson, Inc." The latter corporation was selected as the building or construction contractor. It constructed the 611 modern housing units here involved for plaintiff corporation, and was compensated therefor by it. The

Federal Housing Administration's amended Project Analysis, dated January 24, 1951, estimated that compensation required to be paid the building corporation for such construction would be $285,750. It estimated that plaintiff's net annual income from rentals, with 97 percent occupancy, after payment of maintenance, operating expenses, and taxes, would be $326,798. It estimated that the maximum insurable mortgage on plaintiff's interest in the project should be $4,949,100. In conformity with the Wherry Housing Act, the Secretary of the Air Force certified that the average monthly rental charged and collected by plaintiff should be and was $71.04 per unit, which at 100 percent occupancy would gross $520,865.28 per year.

On January 18, 1951, the Secretary of the Air Force and plaintiff corporation entered into a lease whereby plaintiff was leased some 63 acres of described land on Offutt Air Force Base for a period of 75 years at $100 a year, "to be used for the purpose of erecting, maintaining and operating [fol. 457] a housing project, consisting of approximately 611 units, substantially in accordance with the outline plans and specifications submitted to the Department of the Air Force and in accordance with the detailed plans and specifications to be approved by the Federal Housing Commissioner * * *." Forty-eight acres of such described land had been previously deeded to the United States by the Omaha Chamber of Commerce and the Air Force had appropriately taken exclusive jurisdiction thereof.

The lease required: "That an application for mortgage insurance under Title VIII of the National Housing Act, as amended, for the said housing project, including Exhibits required therein, shall be submitted to the Federal Housing Administration within forty-five (45) days from the effective date of this lease. * * * That the Lessee shall lease all units of the housing project to such military and civilian personnel of the Army, Navy, Marine Corps or Air Force (including Government Contractors' employees assigned to duty at the military installation or in the area where such property is located, as are designated by the Commanding Officer, Offutt Air Force Base, Omaha, Nebraska; provided, however, that" under certain circumstances and conditions, the lessee might lease such unit or

units to persons other than such military or civilian personnel if their leases were limited to a term of 1 year with provision for an automatic renewal thereafter from month to month.

Section 8 of the lease specifically provides: "That the Lessee shall pay to the proper authority, when and as the same become due and payable, all taxes, assessments, and similar charges which, at any time during the term of this lease, may be taxed, assessed or imposed upon the Government or upon the Lessee with respect to or upon the leased premises. In the event any taxes, assessments, or similar charges are imposed with the consent of the Congress of the United States *upon the property owned by the Govern-* [fol. 458] *ment and included in this lease (as opposed to the leasehold interest of the Lessee therein), this lease shall be renegotiated* so as to accomplish an equitable reduction in the rental provided above, which shall not be greater than the difference between the Amount of such taxes, assessments, or similar charges and the amount of any taxes, assessments or similar charges which were imposed upon such Lessee with respect to his leasehold interest in the leased premises prior to the granting of such consent by the Congress of the United States; * * *." (Italics supplied.)

Plaintiff was required to comply with all applicable laws; to keep the buildings and improvements in good order, condition, and repair, and save the government harmless from failure in that respect; to keep them insured against fire in an amount determinable by the government but at its own expense, with loss payable to lessee and any security holder jointly as their interest may appear; and in the event of any partial loss or damage to the improvements, lessee was required within a reasonable time to restore them to their former condition. Plaintiff also had the right to permit utility companies to extend water, sewer, gas, telephone, and electric power lines on the premises for the exclusive purpose of furnishing utilities to the housing project.

Thereafter, on February 1, 1951, plaintiff, as mortgagor, mortgaged its "described leasehold situated in the —— of ——, County of Sarpy, and State of Nebraska, to wit: all right, title, interest and privileges of the mortgagor in

and to that certain ground Lease between the Secretary of the Air Force representing the United States of America, and Mortgagor, dated January 18, 1951 * * * Together with the privileges and appurtenances to the same belonging, and all of the rents, issues, and profits which may arise or be had therefrom; and * * * all buildings and improvements of every kind and description now or hereafter erected, or placed thereon," including all fixtures of every described kind "together with all building materials and equipment now or hereafter delivered to said premises and intended to be installed therein" and "All articles of per-
[fol. 459] sonal property owned by the Mortgagor and now or hereafter attached to or used in and about the building or buildings now erected or hereafter to be erected on the lands herein described" all of which property was deemed fixtures to the extent permitted by law. The mortgagee was Manufacturers Trust Company of New York. The principal of the mortgage was $4,949,100 with interest at 4 percent per annum, upon the unpaid balance until paid by monthly installments of $22,683.37, all according to the terms of a promissory note of even date. In addition thereto, plaintiff agreed to pay monthly to the mortgagee a sum sufficient to prevent delinquency of premium charges under the contract of mortgage insurance with the Federal Housing Commissioner, together with ground rentals, tax assessments, water rents, fire, and other hazard insurance premiums. Plaintiff also agreed to pay all taxes levied on the mortgagee's interest in the improvements and upon the mortgage or debt secured thereby, excluding any income tax, state or federal, imposed on the mortgagee.

Plaintiff was required to keep the improvements and equipment then existing or thereafter erected, insured against loss by fire or other hazards, in an amount equal to not less than 80 percent of the actual cash value thereof, with loss payable to mortgagee and the Federal Housing Commissioner as their interests may appear. The mortgage also provided that any amount paid for loss should, to the extent of indebtedness unpaid, be paid to the mortgagee and at its option such may be applied on the debt or released for repairing or rebuilding the premises.

Plaintiff further agreed to commit or suffer no waste of the property and keep same in good condition and re-

pair, and in all respects conform to and comply with the covenants, provisions, terms, conditions, and agreements of the valid ground lease executed January 18, 1951, then in full force and effect. Many other provisions, terms, and conditions upon which the right of forfeiture or default might depend appear in the mortgage, but they are of no [fol. 460] importance here. The mortgage was duly insured by the Federal Housing Administration, and the 611 modern housing units, equipped as covered by the mortgage, were constructed, with 78 percent of them completed by March 10, 1952, and all of them by about June 6, 1952. Concededly, the buildings and improvements have a useful life expectancy of only about 35 years.

On April 11, 1952, the Attorney General of this state rendered an opinion that plaintiff's interest in the project, including all of the personal property used therein, was taxable as personal property. Report of Attorney General, 1951-1952, p. 486. Nevertheless, plaintiff filed no tax return, and on June 23, 1952, the county assessor of Sarpy County prepared and filed a "Business 1952 Schedule," for plaintiff corporation in which he listed "Furniture & Fixtures—Tools & Equipment $205 * * * Household Appliances $69,695 * * * Improvements on Leased Land $775,785." The total was listed as "Apartment Houses $825,685." The property is not located in any municipality or school district, thus there was a state and county tax levy and assessment of $10,783.45, no part of which tax was ever paid by plaintiff after due notice thereof.

In that connection, section 4 of the Enabling Act provides in part: "* * * that no taxes shall be imposed by said state on lands or property therein belonging to or which may hereafter be purchased by the United States," Volume 2, R. R. S. 1943, p. 7. Section 72-601, R. R. S. 1943, provides in part: "The consent of the State of Nebraska is granted to the United States of America * * * for the purchase by the United States of such other lands within the State of Nebraska as the agents or authorities of the United States may from time to time select for the erection of forts, magazines, arsenals and other needful buildings" Section 72-602, R. R. S. 1943, provides: "The jurisdiction of the State of Nebraska in and over the lands mentioned in section 72-601 shall be ceded to the United

[fol. 461] States: Provided, the jurisdiction ceded shall continue no longer than the United States shall own or occupy such lands." Section 72-604, R. R. S. 1943, provides: "The jurisdiction ceded shall not vest until the United States shall have acquired the title to such lands by purchase or grant. So long as the lands shall remain the property of the United States, when acquired as provided in section 72-601, and no longer, they shall be exempt from all taxes, assessments, and other charges which may be levied or imposed under the authority of the laws of this state."

Article I, section 8, Constitution of the United States, gives Congress exclusive legislative authority over all such places purchased by consent of the Legislature of the state, and gives it authority "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Thus, if Congress by its legislative acts heretofore set forth consented to the occupation of its lands by lessee and the taxation of lessee's interest in the project erected thereon, then, in that respect, any immunity or exemption thereof from taxation appearing in the Enabling Act and ceding statutes of this state was waived. In other words, the right to tax lessee's interest in the housing project located on the air base was re-ceded to the State of Nebraska. Board of County Commissioners v. United States, 105 F. Supp. 995. Such case is also comparable in principle with that at bar and supports the right to tax plaintiff's interest here involved.

Article VIII, section 1, Constitution of Nebraska, provides in part: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct; but taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, and taxes uniform as to class may be levied by valuation upon all other property." [fol. 462] Section 2 provides in part: "The property of the state and its governmental subdivisions shall be exempt from taxation. * * * No property shall be exempt from taxation except as provided in this section." In that con-

nection, plaintiff's interest here involved is not constitutionally exempt from taxation.

Further, our revenue and taxation statutes are controlling. Section 77-102, R. R. S. 1943, provides: "The word 'property' includes every kind of property, tangible or intangible, subject to ownership." Section 77-104, R. R. S. 1943, provides: "The term 'personal property' includes all property other than real property and franchises." Section 77-201, R. R. S. 1943, provides: "All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value." (Such statute was amended, effective March 6, 1953, to provide that all such property should be valued at its actual value, but shall be assessed at fifty percent of its actual value.) Section 77-1201, R. R. S. 1943, provides in part: "A complete list of all personal property held or owned on March 10 of the year in which the assessment is being made, except motor vehicles, shall be made as follows: (1) Every person of full age and sound mind, being a resident of this state, shall list * * * all other personal property, * * *." Section 77-1229, R. R. S. 1943, provides: "Every person required to list property shall make out and verify by his oath a statement of all personal property which he is required to list, either as owner, lessee or occupant in control thereof * * * upon the blanks prescribed by the State Tax Commissioner. Such blanks shall be delivered to each taxpayer by the county assessor or his assistants for that purpose, and when so made out shall be verified by each person before the county assessor, his assistants, a notary public, or some other person authorized by law to take acknowledgments, and be delivered to the county assessor or county clerk as ex officio county assessor on or before April 20 of each year."

[fol. 463] This court in Ashby v. Peters, 124 Neb. 131, 245 N.W. 408, next reported 128 Neb. 338, 258 N.W. 639, 99 A. L. R. 843, held that: "Save for the purposes of conveyancing, a lease of more than one year is not real estate." See, also, Paul v. Cameron, 127 Neb. 510, 256 N.W. 11. Generally, a lease-hold for a term of years is a chattel real, falling within the classification of personal property. 51 C. J. S., Landlord and Tenant, s. 26, p. 51. For all practical pur-

poses, it may be the equivalent of absolute ownership. 51 C. J. S., Landlord and Tenant, c. 202, p. 809. In that connection, section 77-1209, R. R. S. 1943, specifically applicable here, provides: "All improvements put on leased public lands shall be assessed to the owner of such improvements as personal property, together with the value of the lease, and listed and assessed as such in the place where the land is situated. The taxes imposed on such improvements shall be collected by levy and sale of the interest of such owner, the same as in all other cases of collection of taxes on personal property, or by suit in the name of the county against such owner."

For taxation purposes, what is meant by public lands, as used in section 77-1209, R. R. S. 1943? In Union Pacific Ry. Co. v. Karges, 169 F. 459, quoting from Northern Lumber Co. v. O'Brien, 139 F. 614, 71 C. C. A. 598, it is said: " 'The words "public land" have long had a settled meaning in the legislation of Congress, and, when a different intention is not clearly expressed, are used to designate such land as is subject to sale or other disposal under general laws, but not such as is reserved by competent authority for any purpose or in any manner, although no exception of it is made. (Numerious cases cited.)' " However, thereafter the court said: "These decisions do not conflict with the settled doctrine that, where it clearly appears from the statute that the term 'public lands' is intended to include lands which have theretofore been reserved by Congress for a specific purpose, such intention [fol. 464] will prevail, as it is a fundamental rule of construction that a legislative act is to be interpreted according to the plain intention of the legislative body." See, also, Dugan v. Montoya, 24 N. M. 102, 173 P. 118; United States v. Bisel, 8 Mont. 20, 19 P. 251; United States v. Blendaur, 128 F. 910.

Cotulla v. Laxson, 60 Tex. 443, involved a penal statute which made it an offense for any person who was an officer or clerk in the general land office, or a county surveyor or his deputy, to directly or indirectly be concerned in the purchase of any right, title, or interest in any public lands. In that opinion it is said: "That the term 'public land,' as used in that article, is not limited in its signification to unappropriated public domain, but also includes what is

usually designated as public school lands, it seems to us admits of no question. These public school lands were set apart for a public purpose, devoted to the promotion of public education. The act of appropriation, or, rather, the dedication of these lands to that purpose, did not work a change in their ownership; true they were not thereafter unappropriated public domain, but as ever belonged to the public."

In DeShazo v. Eubank, (Tex. Cm. App.), 222 S. W. 976, involving a comparable situation, it is said, referring to public lands: "The sense in which the term is used may vary somewhat in the different statutes, and it should be given such meaning as will effectuate the intention of the Legislature in its use." The opinion thereafter cited and quoted with approval from Cotulla v. Laxson, *supra*.

As stated in 73 C. J. S., Public Lands, s. 1, p. 647: "The meaning of the words 'public lands,' may vary somewhat, however, in different statutes passed for different purposes, and they should be given such meaning in each as comports with the intention of the legislature in their use." See, also, State ex rel. Sioux County v. Tucker, 38 Neb. 56, 56 N. W. 718.

[fol. 465] We believe our Legislature intended that the term "leased public lands" as used in section 77-1209, R. R. S. 1943, for taxation purposes, should and does mean "lands belonging to the public, which have been leased as authorized by law."

Plaintiff's lease provided that upon its expiration or earlier termination, all improvements made upon the leased premises should, with exceptions unimportant here, remain the property of the government without compensation. It also provided that the buildings and improvements erected by the lessee constituting the housing project should be and become as completed real estate and part of the leased land public buildings of the United States, leased to lessee for the purpose of serving the governmental and public purpose of military housing in accordance with Title VIII of the National Housing Act, and in accordance with the provisions of the lease and subject to the term of the lease and any renewal or extension of the same. As we view it, the first sentence aforesaid simply provided when and in what manner plaintiff's interest would ulti-

mately become the government's property, while the second sentence simply prevented plaintiff from destroying the mortgage security insured by the government and from defeating the purpose of the housing project by removing any of the buildings or improvements from the leased land and assured plaintiff's performance of the terms and conditions of the mortgage and lease. The language used therein did serve to retain the bare legal title in the government for a nominal consideration of $100 per year, but it did not in any manner deprive plaintiff of the ownership of its interest as lessee, which for all intents and purposes was the actual value of all the buildings and improvements, together with the fixtures thereof and all personal property used therein on the leased land so long as its lease was in force and effect. In Ken Reality Co. v. Johnson, 138 F. 2d 809, it is pointed out that: "But when a separate interest in a piece of property is exempt, or its owner is [fol. 466] immune from taxation, the several separate interests must be recognized" for tax purposes.

In that regard, plaintiff's lease was for a period of 75 years, which was 5 years longer than 3 score and 10, the conventional life of ordinary men. It was for a period so long that plaintiff would have dominion or control and could profitably use and consume the entire useful life of two complete generations of housing units, each having a useful expectancy of 35 years, with 5 years still remaining for unexpected longevity. Also, in conformity with federal laws, plaintiff mortgaged its interest as owner thereof for $4,949,100, the estimated replacement cost of which was $5,449,490, and the Federal Housing Commissioner duly insured the mortgage. In addition, plaintiff corporation entered into and filed conditional sales contracts and chattle mortgages covering furniture, appliances, and equipment used in the housing project, the consideration for which totalled $110,033.97. Further, on July 28, 1953, Carl C. Wilson, both as president of plaintiff corporation and as president of Carl C. Wilson, Inc., duly signed and acknowledged the execution of a limited assignment of Offutt housing project rentals to the Douglas County Bank of Omaha for the business purposes and advantage of both corporations. Therein it was represented in part that Offutt Housing Corporation was the owner of 611 housing units

located at Offutt Field, Sarpy County, Nebraska. As a witness in this case, Carl C. Wilson also conceded that the improvements had only a life expectancy of about 35 years, "that any building that was seventy-five years old was not worth maintaining any farther than that," and that plaintiff was entitled to the possession and use together with all income and profits therefrom, for 75 years at a rental of only $100 a year.

We therefore conclude that for purposes of taxation under the provisions of section 77-1209, R. R. S. 1943, plaintiff was in fact and as a matter of law the owner of [fol. 467] all the improvements, including the fixtures, appliances, equipment, furniture, and other personal property used therein, so long as his lease was in force and effect, all of which was taxable as personal property. To conclude otherwise would permit plaintiff to perpetrate a sham and fraud upon the state and its governmental subdivisions.

The following authorities support the foregoing conclusions. Baltimore Shipbuilding & Dry Dock Co. v. Mayor of Baltimore, 97 Md. 97, 54 A. 623, affirmed in 195 U. S. 375, 25 S. Ct. 50, 49 L. Ed. 242, quoted with approval from North Pacific R. R. Co. v. Patterson, 154 U. S. 130, 14 S. Ct. 977, 38 L. Ed. 934, and Wisconsin R. R. Co. v. Price County, 133 U. S. 496, 10 S. Ct. 341, 33 L. Ed. 687, wherein it is said: "'that he who has the right to property, and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of State taxation.'"

The opinion in Meade Heights v. Tax Commission of Maryland, *supra*, disposed of five cases involving the same taxation principles, wherein three private corporations had leased from the United States five separate parcels of land located upon military reservations over which the federal government had exclusive jurisdiction. They severally constructed housing units thereon under authority of the federal housing statutes heretofore cited and discussed. The corporations had appealed from a tax assessment upon their interest in the buildings at full value thereof, and the court affirmed. The situation in such cases was in all material respects identical with that at bar except the particular applicable state statutes and two

provisions of the lease, which could not change the ultimate result herein. In that regard, the lease of Meade Heights, Inc., was of 28½ acres at Fort Meade for 75 years, at a ground rental of $720 per annum, with a provision that title to all improvements erected should remain in lessee with a right of removal at termination, if it so elected. If it did not so elect, they would become property of the government, without compensation to lessee. In that [fol. 468] opinion, it is said: "Coming to the main point, it is perfectly clear that, in the absence of congressional consent, express or implied, a State cannot impose a direct tax upon property owned by the federal government or held for it. (Citing cases.) But it is equally clear that private interests in government property are taxable to their full value. (Citing cases.) In the instant case, Congress has definitely consented to the taxation of the lessee's interest, whatever that may be. It can only complain if, in fact, its reserved interest is subject to taxation. * * * The assessment before us is against the lessee, and purports to reach the full value of the buildings in its hands. The government cannot complain if the tax, otherwise sustainable, increases government costs by its economic incidence. James v. Dravo Contracting Co., 302 U. S. 134, 58 S. Ct. 208, 82 L. Ed. 155; Alabama v. King & Boozer, 314 U. S. 1, 62 S. Ct. 43, 86 L. Ed. 3."

Gay v. Jemison, (Fla.), 52 So. 2d 137, also involved the same taxation principles, but from a somewhat different statutory angle. In such case, the comptroller appealed from a decree in favor of plaintiff enjoining the collection of taxes on materials to be used in construction of 450 housing units on similar land leased by a private corporation from the United States. As hereinafter observed, the lease was in all material respects identical with that here involved. The court in that opinion dismissed plaintiff's bill of complaint, saying: "Comparing the probable useful life of the buildings with the time for which the lease is to extend, the question immediately arises in one's mind whether the useful life of the buildings will not have ended by the time the lease expires. We have already said also that the buildings are for the 'primary' use of military personnel. It may be assumed that this is the chief purpose of the installation; however, the lease contains

the statement that the property may be occupied by civilian as well as military personnel of the army, marine corps, and air force; and, further, that upon failure of the com- [fol. 469] manding officer of the field to designate persons of those classifications to tenant any units within a certain length of time after they become vacant, the lessee may then rent to parties who do not fall in any of these categories.

"It is an obligation of the lessee to comply with all ordinances with reference to licenses and permits to do business and it is its privilege to engage public utility companies to provide water, fuel, telephone service, and electric power for the use of the occupants of the units. The lessee is bound to maintain the property in a state of good repair and to save the government harmless against all actions and suits springing from any failure in this respect.

"The lessee is required at its own cost to insure the buildings and to restore any of them damaged by fire, but if a building is wholly destroyed, then the lessee has the right to determine that the building shall not be reproduced.

"The lessee must pay 'all taxes, assessments, and similar charges which, at any time during the term of (the) lease, may be taxed, assessed or imposed upon the Government or upon the Lessee with respect to or upon the leased premises.'

"The bare title of the property, of course, remains in the United States Government, and for its use the government receives but $100 a year.

"Bearing in mind what we consider the evident intent of the Congress of the United States, and construing the language of the contract between the Government of the United States and the lessee, we cannot arrive at the chancellor's conclusion that this housing project when completed will be a public work owned by the United States Government.

"It is true that the government, through its military, retains a certain supervision over the area where the project is located and has a preference with reference to accommodations for its personnel, but taken as a whole,

[fol. 470] the arrangement is in reality one affording a source of income to the lessee, and we think it is obvious that any money withheld from the state by applying the exemption would not benefit the national exchequer but would reach the pockets of private citizens. The corporation borrows the money, takes the risks, bears the cost of maintenance and insurance, receives the income from rentals, and in case of total destruction of a building by fire, keeps, if it chooses, the money paid by the insurance company to cover the loss. The corporation must pay the debt it incurs to finance the installation, and certainly any profit for a period of seventy-five years belongs to it. Meanwhile as a part of its expenses there is the nominal payment of $100 a year to the government as lessor.

"We believe the Comptroller's position is correct and that the materials furnished by the contractor will not become a part of a government work but of buildings of a private enterprise, and therefore are subject to state tax."

Tampa Bay Garden Apartments v. Gay, (Fla.), 55 So. 2d 739, also involved the same taxation pirnciples from a somewhat different statutory angle. In such case the private corporation appealed from a decree dismissing its bill of complaint and requiring it to secure a certificate of registration and collect a 3 percent sales tax from occupants of the housing units. In the opinion, after citing Gay v. Jemison, *supra*, with approval, the court affirmed the judgment, saying: "We find nothing in these cases or in the language of the pertinent legislative acts that show any purpose whatever to release the jurisdiction of the State over the lands in question so as to prohibit it from imposing the required three per cent sales tax on the housing project."

Davis v. Howard, 306 Ky. 149, 206 S. W. 2d 467, also involved the same taxation principles from a somewhat different statutory angle. In the opinion it was said: "Undoubtedly, it was the purpose of the Congress to recede to the state sufficient sovereignty over Federal areas [fol. 471] within its territorial limits to enable it to levy and collect taxes named in the Act. Otherwise the Act was a futile gesture." See, also, Kiker v. Philadelphia, 346 Pa. 624, 31 A. 2d 289, certiorari denied 320 U. S. 741,

64 S. Ct. 41, 88 L. Ed. 439; Bowers v. Oklahoma Tax Commission, 51 F. Supp. 652.

For reasons heretofore stated, we conclude that plaintiff's interest in the housing units and fixtures as owner thereof was and is taxable as personal property, together with the value of plaintiff's lease, as provided by section 77-1209, R. R. S. 1943. All other personal property belonging to plaintiff corporation and located and used by it in the project by virtue of plaintiff lessee's interest is a part thereof, and could acquire no greater rights of exemption. Accordingly, it was and is also subject to State and local taxation in the same manner as other personal property in Sarpy County. In such a situation, it is elementary that injunction was not available to plaintiff and should have been denied.

The judgment of the trial court should be and hereby is reversed and the cause is remanded with directions to render judgment against plaintiff and for defendants in conformity with this opinion. All costs are taxed to plaintiff.

Reversed and remanded with directions.

[fols. 472-473] Petition for rehearing covering 61 pages filed May 26, 1955, omitted from this print. It was denied, and nothing more by order—June 24, 1955.

[fol. 474-477] In Supreme Court of Nebraska, January Term, A. D. 1955

[Title omitted]

Order Denying Motion for Rehearing—June 24, 1955

This cause coming on to be heard upon motion of appellee for a rehearing herein, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no probable error in the judgment of this court heretofore entered herein. It is, therefore, considered, ordered and

adjudged that said motion for rehearing be, and hereby is, overruled and a rehearing herein is denied.

S. Robert G. Simmons, Chief Justice.

[fol. 478] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 479] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI.—Filed November 14, 1955

The petition herein for a writ of certiorari to the Supreme Court of the State of Nebraska is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 404

OFFUTT HOUSING COMPANY, a Corporation,
Petitioner,

vs.

COUNTY OF SARPY and ROBERT M. EBY, TREASURER OF COUNTY OF SARPY, NEBRASKA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

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H. Rept. (No. 854, 81st Cong., 1st Sess.) 3, 4, 19

S. Rept. (No. 410, 81st Cong., 1st Sess.) 3, 5, 19

S. Rept. (No. 404, 84th Cong., 1st Sess.) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. .....

OFFUTT HOUSING COMPANY, a Corporation,
Petitioner,

vs.

COUNTY OF SARPY and ROBERT M. EBY, TREASURER OF COUNTY OF SARPY, NEBRASKA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

Petitioner, Offutt Housing Company, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Nebraska entered in the above-entitled case.

REFERENCE TO OPINIONS BELOW.

The opinion of the Supreme Court of Nebraska is reported in 160 Neb. 320, 70 N. W. 2d 382, and is printed in the Appendix, *infra*, at pp. 29-53. The opinion (oral), findings and judgment of the District Court of Sarpy County, Nebraska (Tr. 42-49), which are unreported, are printed in the Appendix, *infra*, at pp. 5-28.

JURISDICTION.

The judgment of the Nebraska Supreme Court (Tr. 447, App., *infra*, p. 53) was entered on May 6, 1955. A timely petition for rehearing was filed on May 26, 1955 (Tr. 473) and denied on June 24, 1955 (Tr. 474). The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3), since a right and immunity is especially set up and claimed under the Constitution and statutes of the United States.

QUESTION PRESENTED.

The United States leased to petitioner for 75 years land on an Air Base subject to the exclusive jurisdiction of the United States, for the construction and operation of housing for Air Force personnel. The United States retained title to the buildings. The question presented is whether Nebraska may collect from petitioner a property tax on the buildings and on household appliances and office equipment owned by petitioner. This involves the question whether Congress has waived the immunity of such property from state taxation in the Wherry Military Housing Act of August 8, 1949, 63 Stat. 570, 12 U. S. C. § 1748, or § 6 of the Military Leasing Act of August 5, 1947, 61 Stat. 775, 5 U. S. C. § 626s-6.

STATUTES INVOLVED.

The pertinent provisions of the statutes cited immediately above are quoted in the Appendix, *infra*, at pp. 68-73. The statutory framework which gives rise to this case may be outlined as follows:

In 1949 the military establishment was faced with a problem of loss of skilled personnel because of lack of sufficient housing facilities and the "deplorable" housing

conditions at military installations (S. Rept. No. 410, p. 2, H. Rept. No. 854, p. 4, 81st Cong., 1st Sess.[1]). Although in the past, when the Armed Services were small, the Government itself had provided living quarters for service men (H. Rept. No. 854, p. 4), to have provided the estimated 261,555 family units needed in 1949 would have cost the Government from two to three billion dollars (S. Rept. No. 410, p. 3; H. Rept. No. 854, p. 4, *supra*). To meet this need at slight cost to the Government, through utilizing the services of private enterprise, the Wherry Act amended the National Housing Act (by adding Title VIII) so as to authorize the Federal Housing Administration (FHA) to insure mortgages on housing at or in the area of military installations, upon the certificate of the Secretary of Defense that such housing

> "is necessary to provide adequate housing for such personnel, that such installation is deemed to be a

1. "Representatives of the three branches of the National Military Establishment, appearing before your committee, strongly urged the enactment of this measure. They stressed, in terms of the efficiency of the armed services, the urgent need for adequate housing facilities to serve families of their personnel. They made it abundantly clear that, to attract and hold the highly trained, experienced, and technical personnel now required by the Departments of the Army, the Navy, and the Air Force, it is essential that this personnel be afforded an opportunity to live comfortable and normal lives, insofar as military duty permits, on a reasonable parity in terms of housing, with the average American citizen. The fact that most of them do not now have this privilege is a major contributing factor to the existence of a morale problem that bears on the effectiveness of our armed forces, to the difficulties in recruiting able men, and to the large percentage of trained men who are failing to reenlist at the expiration of their enlistment terms.

"Adequately training men to maintain and operate our present-day intricate war machines is an extensive and costly undertaking. Whenever a trained man fails to reenlist, the investment of the Government in his training is lost to the armed services involved and another man must be given similar training. The Air Force in September 1948 made an analysis of its enlisted personnel which indicated that only 59 percent of all married enlisted personnel intended to reenlist. However, 79 percent indicated that

permanent part of the Military Establishment, and that there is no present intention to substantially curtail activities at such installation." (§ 803, 63 Stat. 570, 12 U. S. C. § 1748b (b) (2)).

(This certificate took the place of the requirement under other titles of the National Housing Act that the Federal Housing Commissioner find that a loan is an acceptable commercial risk.) Insurance of mortgages up to $500,000,000 was authorized, but the President was authorized to increase the amount to $1,000,000,000 (§ 803(a), 12 U. S. C. § 1748b (a)).

The Act also authorized the Secretaries of the military services to lease real property for housing purposes without the restrictions otherwise applicable to the leasing of Government property (§ 805, 63 Stat. 570, 12 U. S. C. § 1748d). The House Report (No. 854, 81st Cong., 1st Sess., p. 5) stated that:

"* * * difficulties in obtaining suitable sites is fre-

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they would reenlist if the Government were to provide family housing. Those failing to reenlist include some of the best trained and most able men." H. R. No. 854, 81st Cong., 1st Sess., p. 4.

The problem still exists in 1955. The Senate Report (No. 404, 84th Cong., 1st Sess., p. 19) on the Housing Act Amendments of 1955 states:

"The Department of Defense testified that there is a net deficit of housing for servicemen and their families at military and naval bases of approximately 234,000 units. The committee was impressed by testimony as to the necessity for eliminating this deficit. One of the paramount considerations is the fact that adequate housing undoubtedly plays an important role in the decision of servicemen to remain in the services. The failure of highly trained specialists to reenlist results in immediate and substantial monetary loss to the Government. For example, in the Strategic Air Command alone, during the past 4 years, the services of 114,848 airmen have been lost through failure to reenlist. According to testimony before the committee, the loss of these men and their replacement by others results in a cost to the United States of $1,694 million. Also significant is the fact that Air Force personnel particularly are required to live on the base or very near it, in order that they may be subject to immediate call."

quently a deterrent to the development of housing by private enterprise in the vicinity of military installations, particularly in isolated areas. The leasing of such sites by the Military Establishment at nominal considerations would further make possible the achievement of lower rentals for the personnel of the establishment."

The Senate Report (No. 410, 81st Cong., 1st Sess., p. 8) noted that the best sites may be on land subject to military jurisdiction, and that such leasing for a nominal consideration would assist and "make possible rentals within the financial reach of a larger number of prospective tenants."

Section 805 of the Act authorized the leasing of property "under the authority of" the Act of August 5, 1947 (61 Stat. 774, 5 U. S. C. § 626s-6), without regard to limitations imposed by said Act with respect to the term or duration of the lease. The Act of 1947 had been enacted to permit the Secretaries of the Armed Services to lease for long terms plants and facilities built by the Government at great expense during the war, which the Government wished to keep in stand-by status but which could be usefully operated by private industry when not needed for military purposes. H. Rept. No. 623, 80th Cong., 1st Sess. p. 3. Section 6 of the 1947 Act (5 U. S. C. § 626s-6) provides:

"The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of this Act shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated."

The purpose of the first sentence of this provision was to remove any doubt as to whether the interest of the lessee,

as distinct from that of the Government as owner of the title, could be taxed in states which permitted taxes upon leasehold interests (see pp. 26-28, *infra*). The second sentence was intended to permit renegotiation of the lease, if Congress by subsequent legislation permitted local taxation of the property leased, which meant the property owned by the Government (H. Report 623, 80th Cong., 1st Sess., p. 3).

STATEMENT.

This is a suit by petitioner against the County of Sarpy and its Treasurer for a declaratory judgment that it is not required to pay the County certain taxes assessed against it and for ancillary injunctive relief (Tr. 3-11). The District Court adjudged that Nebraska had no authority to impose the taxes in question (Tr. 42-49), but the Supreme Court of Nebraska reversed (Tr. 447-472).

The facts are not in dispute. Offutt Air Force Base (formerly Fort Crook), the headquarters of the Strategic Air Command (Tr. 97), is owned by and subject to the exclusive jurisdiction of the United States.[2] The Commander of the Base determined that a housing project at reasonable rentals was needed in order to secure and retain skilled personnel (Tr. 97-98, 105, 110, 139-140), and the Department of the Air Force submitted to the FHA the certificate required by the Wherry Act (Ex. 3, Tr. 280, 68). The Air Force and the FHA thereupon proceeded with the project. On January 18, 1951 the Air Force leased 63 acres of land on the Air Base to petitioner, to be used for the erection of a 611-unit housing project, in accordance with project specifications approved by the Air Force and FHA (Ex. 4, Tr. 283-295, 68). The

2. Nebraska has ceded exclusive jurisdiction (Neb. R. R. S. 1943, §§ 72-601, 602, 604), and the United States has accepted it (Ex. 2, 2(a), Tr. 269, 272-278, 68).

lease was in the standard form used by the Air Force under the Wherry Act at that time (Tr. 153, 165). Only a nominal rental of $100 per year was to be paid to the Government (Ex. 4, p. 6, Tr. 289), in order to keep down the rentals to be charged the subtenants (Tr. 168).[3] Tenants were to be designated by the Commanding Officer from among personnel of the Air Force; only if Air Force personnel were not designated or available could the lessee rent to other persons (Ex. 4, p. 6, Tr. 289).

Paragraph 11 of the lease, which provides that title to the buildings shall be in the United States, reads as follows (Ex. 4, p. 9, Tr. 292):

> "That upon the expiration of this lease, or earlier termination, all improvements made upon the leased premises *shall remain the property of the Government* without compensation, provided that the provisions of this Condition shall not apply to facilities erected by utility companies on the leased premises for the purpose of furnishing utility services to the housing project. The buildings and improvements erected by the Lessee, constituting the aforesaid housing project, *shall be and become, as completed,* real estate and part of the leased land, and public buildings of the United States, leased to Lessee for the purpose of serving the governmental and public purpose of providing military housing in accordance with Title VIII of the National Housing Act, and in accordance with

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3. The nominal character of the rental paid the Government made meaningless Paragraph 8 of the lease (Ex. 4, p. 8, Tr. 291), which provided for renegotiation and reduction of the rental if Congress consented to the imposition of taxes "upon the property owned by the Government and included in this lease (as opposed to the leasehold interest of the Lessee therein)." Paragraph 8 also provided:

> "That the Lessee shall pay to the proper authority, when and as the same become due and payable, all taxes, assessments, and similar charges which, at any time during the term of this lease, may be taxed, assessed or imposed upon the Government or upon the Lessee with respect to or upon the leased premises."

the provisions of this lease, and subject to the term of this lease, and any renewal or extension of this lease." (Italics supplied.)

Maximum rentals were to be fixed by the FHA with the concurrence of the Air Force[4] (Tr. 205, 148-149, 162-163, 191, 198; Ex. 8, Art. V, VII, Tr. 309-310, 72; Ex. 12, pp. 8-9, Tr. 327-328; Ex. 14, p. 2, opp. Tr. 364, 193). Rentals varied with the rank of the tenant, so that lower-paid military personnel would pay less than officers (Tr. 145-146, 133-135; Ex. 14, Tr. 362, 193). These rentals are lower than those for comparable housing off the Base (Tr. 118). Rentals were established by the Air Force and the FHA on the assumption that no state or local taxes would be paid (Ex. 13, p. 2, Tr. 358-359, 188, 103, 129-131).[5] If such taxes are payable, the cost will be passed on in the form of increased rentals to the tenants of the project (Tr. 105, 201-2, 358).[6] This affects the likelihood that skilled personnel will remain in the Air Force (Tr. 140, 110).

The Air Force was to provide fire protection and policing (Ex. 4, Paragraph 9, Tr. 291). It furnishes sewage and water service (Tr. 225-227, 237) and access roads (Tr. 237); the lessee maintains the roads within the leased property (Tr. 231, 237). The Base is not in a school district or municipality (Tr. 142; Ex. 1, Tr. 265).

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4. After expiration of the mortgage insurance, rentals are subject to the control of the Air Force (Ex. 4, Pars. 4, 18, Tr. 290, 293).

5. The rentals originally fixed and in effect at the time of trial were based upon the Project Analysis of the FHA (Ex. 13, Tr. 357-360). This Analysis contains the statement (Tr. 358) that it is "Processed on the assumption that the projects will not be subject to State, County or School Property Tax. If such taxes are assessed, rents will have to be adjusted accordingly." A rental increase to cover property taxes has since been allowed, conditional on the outcome of this litigation.

6. See preceding note.

Petitioner is required to provide and maintain household appliances in the apartments (Tr. 238).

As contemplated by the lease, on April 1, 1951, petitioner executed a mortgage in the amount of almost $5,000,000 to the Manufacturers Trust Company of New York on its interest in the property (Ex. 15, Tr. 365-372, 221). The mortgage was insured by the FHA (Tr. 203-204).[7]

Petitioner was incorporated on a model charter form prescribed by FHA (Tr. 196-197, 158), whereby FHA received the preferred stock of petitioner (Tr. 203; Ex. 14, p. 2, Opp. Tr. 364, 193) which gave it voting control in certain circumstances, and the right to control the rentals charged (Ex. 8, Tr. 308-309, 310, 72; FHA Rules and Regulations, Sec. 5, par. 4, Tr. 327-328).

The apartments were then constructed, and were occupied entirely by military personnel and their dependents (Tr. 101). There was testimony that the buildings had a life expectancy of about 35 years (Tr. 233), although they could (although not profitably for petitioner) be repaired and maintained in condition beyond the term of the lease (Tr. 243).

Petitioner did not list with the County Assessor of Sarpy County any property located on Offutt Air Force Base (Tr. 257). On June 23, 1952, the Assessor himself executed a purported "Business and Professional Schedule of Personal Property," which he claimed to be owned by petitioner and subject to taxation (Tr. 257; Ex. 5, Tr. 298-299 (back), 69), copied in the Appendix, *infra*, pp. 3-4. The form is divided into parts for tangible and intangible property. Under part F, entitled "Furniture and Fixtures—

7. This, of course, meant that there was no possibility that a default would result in the foreclosure of the Government's interest in the buildings, since any default would be made good by the FHA, which would then itself succeed to the right of the mortgagee.

Tools and Equipment", the Assessor listed office furnishings, which he valued at $205, and household appliances, which he valued at $69,695. Under part I entitled "Improvements on Leased Land", the Assessor inserted the amount $755,785, which, the Assessor admitted, represented his "opinion as to the value of the buildings" (Tr. 258-259).[8] The total amount of $825,685 was entered opposite the classification of "Apartment Houses" in part J of the form, and also, under Item 135 as the "TOTAL TANGIBLE ASSESSMENT." Nothing was entered under parts K and L as intangible property (which, the form states, is subject "only to an intangible tax of 25¢ on every $100 valuation" for Class "A" intangible property and 80¢ per $100 on Class "B").[9] The Assessor executed a similar return for 1953, after completion of the project (Tr. 257-258, Ex. 6, Tr. 301-302 (back), 70), in which he valued the property at $2,778,580.

On the basis of the 1952 schedule the respondents levied taxes against petitioner in the amount of $10,783.45[10] (Tr. 112). Petitioner did not pay the taxes assessed (Tr. 31, 39), and the respondent County Treasurer threatened to cause a distress warrant to be issued to collect the taxes involved (Ex. 7, Tr. 304, 71).

Petitioner thereupon brought this suit for a declaration that Nebraska and Sarpy County were without power or authority to levy the taxes in question (Tr. 3). After trial the District Court ruled in petitioner's favor (Tr.

8. The form of tax schedule states, under part I, that "you will enter the value of all improvements owned by the business which are not assessed and taxed as real estate." (Tr. 299 (back)). This obviously means physical improvements.

9. See Neb. R. R. S. 1943, §§ 77-702; 1953 Cum. Supp. §§ 77-703.

10. The rate of tax was obviously higher than the rates permitted on intangible property, as described in the form. The tax levy on the property involved for the years 1952-1955 would have been approximately $100,000 if not enjoined.

42-49). See Appendix, *infra*, pp. 5-28. That Court held that the rental housing improvements were real estate and not personal property, and a part of the land on which Offutt Air Force Base is located, that the assessment of $755,785 against such improvements as personal property was illegal, and that the taxes assessed against the tangible property, whether real or personal, on Offutt Air Force Base, were beyond the authority of the State of Nebraska. In its opinion the trial Court held that "under the terms of the lease in question the actual legal title to the apartments, the dwelling units, the buildings themselves, is in the United States Government, exactly the same as it is on the land" (App., *infra*, p. 8), and that they were therefore "beyond the power of Sarpy County to tax as such" (App., *infra*, p. 10). The Court made no "commitment as to whether there might be some taxable leasehold interest" which would be "the very most that Congress has given any consent to tax, if they have given any consent at all" (App., *infra*, p. 10). But the Court concluded that "by no stretch of reasonable construction can the listing of improvements on leased property, or the listing of apartment houses, as was done" here, "be properly construed to be returning for taxation the value of a leasehold interest therein. It is attempting to tax the improvements themselves" (App., *infra*, p. 14). As to the appliances and office equipment, the Court held that under *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, personal property on a military base over which the United States had exclusive jurisdiction could not be taxed, and that also they could not possibly be regarded as within any consent given by Congress to the taxation of leasehold interests (App., *infra*, pp. 13-14).

The Supreme Court of Nebraska reversed (Tr. 447-471, App., *infra*, pp. 29-53). It held that taxes were imposed only on Lessee's interest in the housing project, that Congress had re-ceded to Nebraska the right to tax Lessee's

interest in that project, that the Government's "bare legal title" to the buildings and improvements did not deprive petitioner "of the ownership of its interest as lessee, which for all intents and purposes was the actual value of all the buildings and improvements, together with the fixtures thereof and all personal property used therein" (App., *infra*, p. 46).

How the Federal Question Was Presented. As appears from the Statement, the Federal question as to whether the United States Constitution and statutes preclude Nebraska from taxing the property involved has been the principal issue in this case since its commencement. The question was presented in the amended complaint, particularly paragraphs IV, V, VIII, IX, X, XII, A, B, E and Prayer (Tr. 3-10), was decided by the District Court (Tr. 45 and oral opinion, App., *infra*, pp. 5-28), was argued in the briefs for both parties (Tr. 51, 53, 55), and was decided by the Nebraska Supreme Court (Tr. 451-471; App., *infra*, pp. 29-53).

REASONS FOR GRANTING THE WRIT.

I.

This case involves the right of the states to impose property taxes on military housing projects owned by the United States and constructed under the Wherry Act on land over which the United States has exclusive jurisdiction. We are advised by the Department of Defense that a leasing arrangement giving the United States title to improvements, such as is used in this case, has been employed on 203 of the 259 Wherry Act projects, in which 67,767 housing units have been constructed.[11] 159 projects

11. The total number of projects is 259, of which 72 are Army, 82 Navy, and 105 Air Force. Some early projects, principally of the Army, used leases giving the lessee title to the improvements. This form was abandoned and has not been used in recent years. It was involved in some of the litigation cited in notes 14 and 16, *infra*.

containing 53,339 units[12] are on land over which the United States has exclusive jurisdiction.[13]

Since the determination of this case rests upon the interpretation of the Federal constitutional immunity and of federal statutes, the importance of the questions presented far transcends Nebraska and the Offutt Air Force Base. Furthermore, Nebraska has upheld an assessment as tangible property of the buildings and improvements owned by the United States, not of petitioner's leasehold interest. Such a tax could presumably be imposed under the laws of all of the states as a tax on real property.

The question as to the taxability of similar projects is or has been before the courts in a number of states.[14] The

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12. The number as to the Navy was estimated.

13. Additional projects certified up to June 30, 1955, which may still be constructed under the Wherry Act, would also be affected. The original 1949 Act was extended to 1955. The Act of August 11, 1955, known as the Housing Amendments of 1955, Public Law 345, 84th Cong., revised Title VIII dealing with military housing, makes the Government the operator of projects built by private contractors under the 1955 Act, and also eliminates the provisions relied upon here as a waiver of immunity from state and local taxation. But Section 408 of the Act (quoted in Appendix, p. 75, *infra*) left the prior law applicable to projects certified prior to June 30, 1955. This means that the provisions of the original Wherry Act of 1949 involved in this case will still apply to the 203 projects referred to in the text.

14. *Meade Heights, Inc.* v. *State Tax Commission of Maryland*, 202 Md. 20, 95 A. 2d 280 (1953), relied on below, differed materially in that the older type of lease used in that case gave the lessee rather than the Government title to all buildings and improvements, with the right to remove them when the lease expired. See note 11 *supra*. The other cases primarily relied on by the court below involved sales or use taxes which Congress in the Buck Act (61 Stat. 641, 4 U. S. C. §§ 104-110) has specifically permitted to be imposed upon Federal areas. The cases are all therefore easily distinguishable, although the Florida cases (*Gay* v. *Jemison*, 52 So. 2d 137 (1951), and *Tampa Bay Garden Apartments* v. *Gay*, 55 So. 2d 739 (1951)) contain language which supports the decision below.

Court of Appeals for the Third Circuit has recently held such projects to be taxable, in a case arising in New Jersey, *Fort Dix Apartments Corp.* v. *Borough of Wrightstown*, No. 11512, decided August 23, 1955.[15] In Virginia, Massachusetts, New Mexico and Washington, state trial courts have held that the lessee of such projects may not be taxed on the value of the improvements.[16] We have also been advised by the Department of Defense that similar litigation is now pending in Texas, Mississippi, South Dakota, Missouri and Florida.[17] Attorneys General and other officials of 11 states—Connecticut, Colorado, Georgia,

15. We are advised that a petition for certiorari will be filed in the *Fort Dix* case.

16. *Thomason Park, Inc.* v. *County of Prince William*, Cir. Ct. of Prince William County, Virginia, decided January 5, 1955, appeal pending; *Westover Development Corp.* v. *Asselin*, Super. Ct. Hampden County, Mass., No. 74569, decided January 21, 1952; *Buena Vista Homes, Inc.* v. *Board of County Commissioners*, Dist. Ct., Dona Ana County, New Mexico, No. 13,213, 1954; *Moses Lake Homes, Inc.* v. *Grant County*, Super. Ct. for Grant County, Washington, No. 8095, opinions of October and December 1952 (not taxable after United States acquired title to buildings and improvements, taxable before). The well-reasoned opinion of the Virginia court in the *Thomason Park* case is printed in the Appendix, *infra*, pp. 54-68. An Alabama trial court has held the contrary in a case now pending before the State Supreme Court, *Brookley Manor, Inc.* v. *State of Alabama*, No. 547, First Div., Sup. Ct., Alabama. New York and Georgia trial courts have upheld the taxability of improvements where title to the improvements remained with the lessee rather than the United States, as was the situation in the *Meade Heights* case referred to in note 14, *supra*. *Fort Hamilton Manor* v. *Boyland*, pending on appeal, No. 12,252, New York App. Div., 2nd Dept.; *Conley Housing Corp.* v. *Coleman*, pending on appeal, No. 19001, Sup. Ct., Georgia.

17. *Likins-Foster Biggs Corp.* v. *Deason, Tax Assessor*, U. S. D. Ct., W. D. Tex., El Paso Div., Civil No. 1562; *Board of Supervisors of Harrison County* v. *Military Housing, Inc., Keesler AFB Project*, U. S. D. Ct., S. D. Miss., S. Div., Civil No. 1381; *Renel Heights, Inc.* v. *Gibbs, Treasurer*, 7th Jud. Cir. So. Dak., filed April 29, 1955; *State* v. *Personnel Housing, Inc.*, Cir. Ct., St. Louis County, Mo., No. 206031, Div'n. 6; *Patrick Gardens* v. *Nash, Tax Collector*, Cir. Ct., 9th Jud. Cir., Brevard County, Florida, No. 13,852.

Maine (Assistant Attorney General), Michigan, New Mexico, New York, Ohio, South Dakota, Wyoming (Assistant Attorney General), and the State Tax Commission of Oregon—have given opinions that such projects are not taxable.[18] In addition, the Attorneys General of Utah and Florida have held that the leasehold interest is taxable, but that the value of the buildings is not,[19] and the Attorneys General of Washington and Texas have ruled that leasehold interests are taxable except where the United States has exclusive jurisdiction.[20] (These opinions are

18. Connecticut, letter from Attorney General George C. Conway to Hon. William F. Connelly, Tax Commissioner, Hartford, Conn., October 15, 1952; Colorado, letter from Attorney General John W. Metzger to L. B. Arnold, Vice President, Industrial Federal Savings, Denver, Colorado, October 9, 1950; Georgia, letter from Attorney General Eugene Cook to Hon. J. Archie Johnson, Tax Collector, Chatham County, August 11, 1952; Maine, memorandum from Assistant Attorney General Boyd L. Bailey to State Tax Assessor, March 16, 1953; Michigan, letter from Attorney General Frank G. Millard to D. Hale Brake, Treasurer of Michigan, January 16, 1951; New Mexico, letter from Attorney General Joe Martinez to N. R. Reese, District Attorney, Roswell, New Mexico, December 10, 1951; New York, informal opinion letter from Attorney General Nathaniel L. Goldstein to Department of the Air Force, May 1, 1952; Ohio, letter from Attorney General William O'Neill to M. H. Heck, Prosecuting Attorney, Montgomery County, May 21, 1952; South Dakota, letter from Attorney General Ralph A. Dunham to Col. Hubert Miller, Rapid City Air Base, April 7, 1952; Wyoming, letter from Assistant Attorney General Jack D. Froggatt to Walter B. Phelan, County and Prosecuting Attorney, Cheyenne, Wyoming, May 15, 1951; Oregon, letter from State Tax Commission Attorney S. B. Stewart to District Public Works Office, 13th Naval District, U. S. Naval Receiving Station, Seattle, Washington, March 6, 1952.

19. Utah, opinion of Attorney General E. R. Callister to Davis County Attorney, April 30, 1955; Florida, letter from Attorney Richard W. Ervin, Office of the Attorney General, to Board of County Commissioners, Hillsborough County, July 25, 1950. The Utah opinion states that "The fair cash value of a leasehold is the present worth of the rental value of the property (income) for the unexpired term less the rent reserved and costs."

20. Washington, letter from Attorney General Smith Troy to Hugh H. Evans, Prosecuting Attorney, Spokane County, March 20, 1951; Texas, letter from Attorney General Price Daniel to Hon. Stewart W. Hellman, Criminal District Attorney, Tarrant County, August 22, 1951.

collected in the Office of the Chief, Management Branch, Family Housing Division, Directorate of Facilities Support, United States Department of the Air Force.) Thus, in 17 states, courts or officials have reached a conclusion contrary to that of the court below and of the 3rd Circuit.

The legislative history of the Wherry Act (*supra*, pp. 3-5) shows that its purpose was to provide low-rent housing for military personnel, not for their own sake, but in order to counter the great difficulty in keeping skilled trained men in the military services.[21] A high turnover decreases efficiency, and the training of new personnel is extremely costly to the Government, particularly as military activity becomes more technical and scientific. It was estimated that lower rentals and decent housing would cause 20% more of the Air Force to re-enlist (see note 1, pp. 3-4, *supra*). An important reason for using Government property for military housing has been to reduce the rentals which must be charged. Effectuation of this governmental purpose, which is directly related to the efficiency and the cost of maintaining the military services, will be impaired if the rentals must be increased to pay state and local taxes. For, as the record here demonstrates (Tr. 105, 201-202, 358), such taxes will be passed on to the military personnel occupying the apartments.

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21. See also the testimony of Col. Beck as to the importance of adequate housing to the retention of skilled Air Force personnel, as well as to morale and efficiency. (Tr. 105-106, 108-110.) General LeMay testified at the Hearings on the 1955 Housing Amendments (see note 13, p. 13, *supra*) (Hearings before a Subcommittee of the Senate Committee on Banking and Currency, 84th Cong., 1st Sess., on the Housing Act of 1955, p. 480):

> "In our surveys throughout Strategic Air Command we have determined that there are five factors which influence retainability of an individual in the Air Force. These are pay, commissary privileges, post-exchange privileges, medical care, and housing. Our surveys further have indicated that housing has a greater influence upon retainability than any of the other four."

The foregoing demonstrates that this case is sufficiently important for review by this Court because of its applicability to many large projects on military installations throughout the nation, because of the detrimental effect of the decision upon attainment of the purpose of the Federal statute, and because of the wide divergence of opinion in the states as to the proper solution of the question presented.

Before turning to the merits of the case, however, one significant preliminary observation should be made. This is not a case in which a state or locality which provides governmental services to an enterprise is being deprived of the revenues needed to pay for such services. Nebraska and Sarpy County do not provide such services on Offutt Air Force Base, and we are advised by the Department of the Air Force that this is generally true as to military bases over which the United States has exclusive jurisdiction. The housing project is not in a Nebraska school district (Tr. 142), which means that Nebraska does not use tax money to pay for schooling for military dependents.[22] As has been indicated, the Air Force provides access roads, fire and safety (police) protection, sewage and water service, which, with schools, are the principal items for which local governments collect taxes. Petitioner itself provides roads within the project (Tr. 237). (Under the Buck Act (note 14, p. 13, *supra*), residents

22. The Acts of September 23, 1950, 64 Stat. 967, and September 30, 1950, 64 Stat. 1100, as amended, 20 U. S. C. §§ 236-244, 251-280, provide for federal aid in the construction and operation of schools in areas affected by federal activities. We are advised that the Commissioner of Education has made arrangements under these statutes to pay for the education of children of Offutt Air Base personnel. See Annual Reports of the Commissioner of Education to Congress on the Administration of Public Laws 874 and 815, with respect to payments to the City of Bellevue, Nebraska, which adjoins Offutt Air Base: 1954 Report, pp. 65, 138; 1953 Report, pp. 59, 123; 1952 Report, pp. 52, 103; 1951 Report, pp. 28, 57.

within the military reservation must pay the state gasoline taxes which furnish revenues for the maintenance of state roads outside the base.) To require the military personnel to pay taxes for services which the State and local governments do not provide would be to create an inequity, not to abolish one.

II.

Both the buildings and improvements and the appliances and furniture sought to be taxed here were on a military base over which the United States has exclusive jurisdiction, which means that the United States has "complete sovereignty"[23] over that territory.[24] Absent the consent of Congress, the states cannot tax even the property of private persons on such federal enclaves. *Surplus Trading Co.* v. *Cook*, 281 U. S. 647 (blankets owned by a private company); *S. R. A., Inc.* v. *Minnesota*, 327 U. S. 558, 562-563; *Howard* v. *Commissioners*, 344 U. S. 624, 627. This principle applies to all the property in issue here, whether owned by the United States or by petitioner. In addition, the buildings and improvements are owned by the United States, and are not taxable by the State or county for that reason also; irrespective of their location.[25] *Van Brocklin* v. *Tennessee*, 117 U. S. 151; *United States* v. *Allegheny County*, 322 U. S. 174, 176-177.

The Supreme Court of Nebraska held that Congress has

23. *S. R. A., Inc.* v. *Minnesota*, 327 U. S. 558, 562.

24. The Air Force was careful to vest the United States with exclusive jurisdiction over newly acquired land on which part of the Offutt housing project was built (Ex. 2, Tr. 269).

25. The Act of Congress of April 19, 1864, providing for admission of Nebraska into the Union (13 Stat. 47), provides:

> "That the people inhabiting said territory do agree and declare that * * * no taxes shall be imposed by said state on lands or property therein belonging to or which may hereafter be purchased by the United States."

specifically re-ceded to the States the right to impose taxes such as that involved here. We shall show that Congress has not consented to the taxes in question.

1. *The 1949 Statute.* The Court below did not base its decision on Section 807, the only provision of the Wherry Act dealing specifically with the question of tax exemption. That section, which is common to many Titles of the National Housing Act,[26] provides that "Nothing in this Title shall be construed to exempt any real property acquired and held by the [Federal Housing] Commissioner" from local taxation. It was designed to make certain that government insured privately owned taxable property acquired by the Commissioner on default should not go off the local tax rolls, not that otherwise non-taxable governmental property be taxed. The provision has no application here, since no property held or acquired by the Commissioner is involved, and because on its face, Section 807 is not a waiver of a previously existing immunity but only a bar to an additional exemption for property otherwise taxable.

The only reference to the taxing problem, apart from a paraphrasing of Section 807 in the Committee Reports,[27] reflects an understanding that housing built on government land would not be taxable. During the Hearings before the House Committee, after Housing and Home Finance Administrator Foley had stated that he did not know what proportion of the projects would be built on Government-owned property, the following colloquy oc-

26. § 57, 55 Stat. 365, 12 U. S. C. § 1706b; § 208, 48 Stat. 1252, 12 U. S. C. 1714; § 307, 48 Stat. 1255, 12 U. S. C. § 1722; § 606, 55 Stat. 61, 12 U. S. C. 1741.

27. S. Rept. 410, 81st Cong., 1st. Sess., p. 8; H. Rept. No. 854, 81st Cong., 1st Sess., p. 7, each of which states that "Section 807 would provide that the acquisition of real property by the Commissioner under Title VIII would not exempt it from taxation."

curred (Hearings on Military Rental Housing before House Committee on Banking and Currency, H. R. 4491, 81st Cong., 1st Sess., p. 37):

> "Rep. Nicholson. If they were built on land other than the reservation, the housing would be taxed, would it not?
>
> "Mr. Foley. You mean building on lands adjacent to military installations but not owned by the military?
>
> "Rep. Nicholson. That is right. That would be subject to tax by the local community * * *."

Neither the Administrator nor anyone else at that time or later suggested that Rep. Nicholson's statement, which implied that only housing built off the reservations could be taxed, was too restrictive.

The court below rested its decision on Section 805 of the Wherry Act (63 Stat. 570, 12 U. S. C. § 1748(d)), which provides:

> "Whenever the Secretary of the Army, Navy, or Air Force determines that it is desirable to lease real property within the meaning of the Act of August 5, 1947 (61 Stat. 774), to effectuate the purposes of this title, the Secretary concerned is authorized to lease such property under the authority of said Act upon such terms and conditions as in his opinion will best serve the national interest without regard to the limitations imposed by said Act in respect to the term or duration of the lease, and the power vested in the Secretary of the Department concerned to revoke any lease made pursuant to said Act in the event of a national emergency declared by the President shall not apply."

On its face this Section says nothing about waiving immunity from taxation. But the authority to lease "under the authority of" the Act of August 5, 1947 is said to incorporate by reference the provision in Section 6 of the latter statute, quoted at p. 5, *supra*, which provides that

"the lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation."

2. *The 1947 Statute.* (a) If it be assumed *arguendo* that this provision is incorporated by reference in the 1949 Act and that it applies to Federal enclaves (but see pp. 26-28, *infra*), the tax involved here was nevertheless not authorized. For the tax here was not imposed upon the "lessee's interest," but upon the tangible property, most of which was owned by the United States. Section 6 differentiates between the two, since under the second sentence "such property" may be taxed only if made taxable by subsequent act of Congress. Here, as appears from Ex. 5, Tr. 298-299, App. *infra*, pp. 3-4, the assessment which was sustained was on office furniture, "Household Appliances" and "Improvements on Leased Land", as "TANGIBLE PROPERTY."[28] The value of that physical property was assessed (Tr. 258-259), not anything else. That is what the Assessor said he was assessing. The "lessee's interest" would not be tangible property, and if taxed as an intangible (which it was not) would have been taxed at a much lower rate. See p. 10, *supra*.

The tangible "Improvements on Leased Land" (the apartment buildings) were not taxable under a statute permitting taxation of the "lessee's interest". The improvements were real estate owned by the United States, which retained title under Section 11 of the lease.

The court below advanced several reasons why it thought the tax imposed merely on the lessee's interest. In the first place, it misconstrued, and refused to give effect to, the provisions of the lease that "all improvements shall

28. It does not seem material that the property was assessed as tangible personalty rather than realty, though the buildings and improvements actually were, and were stated in this lease (p. 7, *supra*) to be, "real estate".

remain the property of the Government", and that "the buildings and improvements erected by the lessee * * * shall be and become as completed, real estate and part of the leased land, and public buildings of the United States * * *." See p. 7, *supra*. It held that this language "simply provided when and in what manner plaintiff's interest would ultimately become the Government's property," and "simply prevented plaintiff from destroying the mortgage security insured by the Government * * * by removing any of the buildings or improvements * * * and assured plaintiff's performance of the terms and conditions of the mortgage and lease." Appendix, *infra*, pp. 45-46. The Court concluded that the Government had the "bare legal title" (Appendix, *infra*, p. 46) and that "plaintiff was in fact and as a matter of law the owner of all the improvements * * *." Appendix, *infra*, p. 47.

As to the buildings and improvements, the court's ruling was contrary to the unambiguous provisions of the lease. This Court, not the state court, has the final say "in determining the meaning and effect of contracts to which the United States is a party." *S.R.A., Inc.* v. *Minnesota*, 327 U. S. 558, 564;[29] *United States* v. *Allegheny County*, 322 U. S. 174, 183; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110, 121, and cases cited. Here the contract of lease plainly placed title to the buildings and improvements in the United States. The fact that a purpose of the Government in putting this provision in its form lease may have been to prevent taxability by local bodies would not make it any the less effective.[30] *Kern-Limerick, Inc.* v.

29. The Government's interest was not a mere security interest such as that in the *S. R. A.* case.

30. The statement below (Tr. 467, App. *infra*, p. 47) that "To conclude [that plaintiff was not the owner of the improvements] would permit plaintiff to perpetrate a sham and fraud between the state and its governmental subdivisions." disregards the fact that the provisions of the lease were a part of the government form, and not drafted or suggested by plaintiff.

Scurlock, 347 U. S. 110, 116, 122. Nor does the fact, relied upon below, that the buildings had a shorter economic life expectancy than the lease, mean that the Government lacked title to them, or that its interest was merely nominal.

Moreover, if we go behind the formal documents, it is clear that the Government had a substantial interest in the project. It took most of the financial risk by insuring the mortgage. It determined who could occupy the apartments. It prescribed the maximum rentals. It owned the controlling voting interest in the petitioner. It provided most of the necessary governmental services (see pp. 8, 17, *supra*). Thus a large part, and indeed the most important parts, of the bundle of rights which is normally vested in the owner of a building remained with the Government. The petitioner-lessee is in substance little more than the manager of the project, with the right to whatever profits the Government deems reasonable. And the reason for the Government's interest, as has been shown, is the importance of adequate low-rental housing for the effective maintenance of the Armed Forces.

The Court below also seems to have held that the petitioner's interest as lessee "for all intents and purposes was the actual value of all the buildings and improvements, together with the fixtures thereof and all personal property used therein on the leased land so long as its lease was in force and effect" (App., *infra*, p. 46). But the issue is not as to the value of the lessee's interest,[31] but whether the tax was imposed upon that interest or upon the tangible property itself, which was owned by the United States and not taxable. As to that, this Court is not bound by the state court's characterization of the tax.

"'Where a federal right is concerned we are not

31. Clearly the appliances were lessee's own property, and taxable as such or not at all.

bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted.' *Carpenter* v. *Shaw*, 280 U. S. 363, 367-68." *United States* v. *Allegheny County*, 322 U. S. 174, 184.

The decision below in this respect is inconsistent with this Court's decision in the *Allegheny County* case. In that case, the Pennsylvania court had declared the state tax not to be on the Government-owned machinery, leased to the Mesta Corporation, but that the machinery was considered only as an enhancement of the value of Mesta's land. This Court held, however, that assessment of the machinery, under the general *ad valorem* property tax, proved that "the machinery itself was being assessed and taxed." *Id.*, at 185. Similarly here, the record demonstrates, as the trial court held (App., *infra*, p. 14),[32] that the assessment was imposed directly upon the Government-owned buildings and the appliances, and not upon an intangible leasehold interest (which, under Nebraska law, could only be taxed at substantially lower rates). As in the *Allegheny County* case, "The assessor simply forthrightly valued * * * the Government's machines as

32. The trial court's oral opinion stated (App., *infra*, p. 14) "* * * certainly by no stretch of reasonable construction can the listing of improvements on leased property, or the listing of apartment houses, as was done on the 1952 personal property tax schedule return by the assessor for the plaintiff in this case, be properly construed to be returning for taxation the value of a leasehold interest therein. It is attempting to tax the improvements themselves, which I say you can not do because they belong to the United States Government and that has removed them beyond the field of Sarpy County to tax without consent, and I am not making any commitment as to whether or not Sarpy County could tax the value of a leasehold interest in something to which possibly Congress has consented; I do not know what the value of such leasehold interest would be, but that is something that does not have to be passed upon at this time in order to decide the issues in the case presented * * *."

machinery." Here the assessor valued the Government's buildings and improvements as "improvements". The Court said in that case (p. 185):

> "We discern little theoretical difference, and no practical difference at all, between what was done and what would be done if the machinery were taxed in form. Its full value was ascertained and added to the base to which the annual rates would apply * * *."

The same is true of the Government-owned buildings here, except that the assessment schedule shows that they were taxed in form as well as in substance. The lessee's interest may or may not be as valuable as the tangible properties[33]—but the Nebraska assessor did not purport to tax it, and the Nebraska court cannot transform a tax on the Government properties into a tax on the lessee's interest.

The appliances and furniture, assessed at $69,900 out of the total assessment of $825,685, are also not assessable as a "lessee's interest, made or created pursuant to the provisions of this Act". They were never leased by the Government to petitioner, but were bought by petitioner in its own name and hence would not be covered by a statutory provision waiving immunity for leased Government property. See App., *infra*, p. 12. Whatever interest the petitioner had in them was not made or created under the Act or by a lease, but by its purchase, which gave it complete title. The status of this property, therefore, was the same as that of any personal property on an exclusive federal enclave, unaffected by Section 6.

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33. The value of the "lessee's interest" would be that of the property minus the cost paid for it, not the value of the property. *Blinn Lumber Co.* v. *Los Angeles County*, 216 Cal. 468, 474, 14 P. 2d 516, 512 (1932); *Yeoman Mut. Life Ins. Co.* v. *State Board*, 229 Iowa 320, 294 N. W. 336 (1940); *People* v. *Sexton*, 258 N. Y. App. Div. 611, 17 N. Y. Supp. 2nd 585 (1940). Although the opinion below contains a passage (Tr. 456, App., *infra*, p. 36) implying that the petitioner has received substantial profits, the record shows that the operation has not been profitable (Tr. 236).

(b) In the preceding discussion it has been assumed that Section 6 of the 1947 statute is applicable. However, the phrase in the Wherry Act of 1949 which refers to the earlier statute does not clearly incorporate by reference anything but the authorizing provision in Section 1 of the latter Act (61 Stat. 774, 5 U. S. C. § 626s-3). As has been shown (pp. 19-20, *supra*), there was no recognition or suggestion in the history of the 1949 Act that any waiver of immunity beyond that provided in Section 807 was contemplated by anyone. The 1947 Act, as has been shown, was concerned with federally owned industrial facilities. The considerations which caused Congress to permit taxing the lessee's interest in such properties did not apply to the 1949 Military Housing Act. If the military housing was not constructed on Federal land, it would be taxable by the states without congressional consent. If the housing project was on a Federal enclave, and not furnished services by the states but by the United States itself, there was no reason why even the lessee's interest in the property should be subject to local taxes. The competitive and other factors which were responsible for a partial waiver of immunity for the industrial plants are lacking here.

Furthermore, we submit, the waiver of immunity for the "lessee's interest" was not intended to apply to enclaves over which the United States has exclusive jurisdiction.

The provision in question was suggested in discussions during the course of the 1947 Senate Committee Hearing between Senator Tydings, Under Secretary Royall and Assistant Secretary Kenney.[34] Senator Tydings and Secretary

34. Hearing before the Senate Committee on Armed Services on S. 1198 (H. R. 3471), 80th Cong., 1st Sess., a Bill to Authorize Leases of Real or Personal Property by the War and Navy Departments, pp. 30-32.

"Senator Tydings. No. First of all, you would have to set up on the assessment books what the company actually owned. What he would own would be a lease. He would

Kenney urged that any such provision was unnecessary, since the states had the power to tax leasehold interests without it. But Secretary Royall, who proposed the language in question, thought it better to eliminate any doubt as to the matter. As a result, the language found in the

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not own the property. Your law would not say that notwithstanding that he does not own any more than the lease, he shall be taxed on the property. He would go to the assessor and prove he only had a leasehold in it for 1 or 10 years. He could not be assessed more than his lease is worth. He could not be assessed for the physical value of the property because he does not own it. He could be assessed for what his lease is worth. That would be all." (P. 30.)

"Mr. Royall. As I say, I understand the possessory interest tax has been applied, and I think it is constitutional. That would apply to this situation if it is constitutional, and I imagine it is.

"You could say in this statute, if there is any question about that, that the possessory interests of the lessee should be subject to local tax.

"Mr. Kenney. A local taxing authority can make the leasehold subject to tax if they want to. That is a matter for the local legislatures to take care of.

"Senator Tydings. You cannot make a man pay taxes on what he does not own.

"Mr. Kenney. Your State could make the leasehold interest itself taxable, which I think should be all that could be taxable.

"Senator Tydings. That is right. Say the lease was for 5 years. You could take up the value of the lease, which would be an infinitesimal part of the value of the property." (P. 31.)

"Senator Tydings. As a matter of fact, if the Government leases to corporation AB a plant for a period of 5 years without us doing anything about it, they would be taxable by each community in America that taxes leasehold property. So why should we put anything in?

"Mr. Kenney. I do not think that you should put anything in this bill.

"Senator Tydings. That is what I am getting at.

"Mr. Royall. I do not see any objection to putting it in there if there is any question about it. You had some language here that the possessor of the leasehold interest pursuant to this act may be subject to local or State taxation. That would help.

"Senator Tydings. Upon the lessee?

"Mr. Royall. That is right." (Pp. 31-32.)

law was agreed upon. This discussion makes sense only if Secretaries Royall and Kenney and Senator Tydings were speaking of Government-owned property leased to private persons in territory subject to state jurisdiction, not property in a Federal enclave. For if it were in territory subject to exclusive Federal jurisdiction, the lessee's interest would not have been taxable without the express consent of Congress, as those good lawyers must have known.

With respect to federal enclaves, a partial recession of jurisdiction, not a mere waiver of immunity, is required to permit state taxation. When Congress wishes to restore such jurisdiction to the states, it does so in clear and express terms. Thus, in the Buck Act of July 30, 1947, 61 Stat. 641, 4 U. S. C. §§ 104-110, enacted six days before the 1947 Leasing Act here involved, Congress authorized the states to impose sales, use and income taxes in "Federal areas", and to impose gasoline taxes on "United States military or other reservations". *Cf. Howard* v. *Commissioners*, 344 U. S. 624, 627-8. See also Assimilated Crimes Act, 62 Stat. 683, 18 U. S. C. §§ 13, 7; Wrongful Death Act, 45 Stat. 54, 16 U. S. C. § 457 ("within a national park or other place subject to the exclusive jurisdiction of the United States"); Workmen's Compensation Act, 49 Stat. 1938, 40 U. S. C. § 290 (lands "owned or held by the United States of America by deed or act of cession").

The bare reference to "lessee's interest", in the 1947 Leasing Act, certainly is not clear and specific enough to manifest an intention to recede *pro tanto* federal jurisdiction over the military enclaves.

CONCLUSION.

This case involves important questions with respect to the power of the states to impose taxes on federally-owned properties in Federal enclaves. The decision below will hamper the Federal program of aiding the military forces through providing low-rental housing for military personnel, and is in conflict with the reasoning of this Court in the *Allegheny County* case. The problem is arising with respect to many Federal military installations. For these reasons, this petition for certiorari should be granted.

Respectfully submitted,

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Note

Exhibit 5 is at start of the next card.

B.

OPINION, JUDGMENT AND FINDINGS OF THE DISTRICT COURT OF SARPY COUNTY, NEBRASKA.

IN THE DISTRICT COURT OF SARPY COUNTY, NEBRASKA.

OFFUTT HOUSING CORPORATION,
Plaintiff,

vs.

THE COUNTY OF SARPY,
Defendant.

DECISION OF THE COURT.

Papillion, Nebraska
June 4, 1954

BY THE COURT: The purpose of asking Mr. Reed and Mr. Entenman to be out here at three o'clock was to announce my decision in the Offutt Housing case. I thought we would probably be through with other matters by three o'clock, but there was a little delay and we did not get completed entirely with the other matters. However, I have gone through and read and re-read the briefs that have been submitted by the parties — rather extensive briefs, incidentally—in connection with this case of Offutt Housing against the County of Sarpy and County Treasurer of Sarpy County, and I do not see that there is much need of delaying my decision any further, as I have had it under advisement for some time. The trial was finally concluded April 20th, then there was some considerable delay in getting all the briefs filed, but they have been in my possession quite a while and I have read them and studied the cases cited and arguments of counsel.

So as not to keep anybody in suspense about my decision, I am going to find for the plaintiff; but I do want to some extent review the basis of my finding.

I have not prepared a journal entry, and expect that plaintiff's counsel will prepare one, probably, in conjunction and after consultation with the County Attorney, or at least submit it to him for approval before it is finally signed.

The situation to begin with concerns a petition for a declaratory judgment. I think that it is entirely proper to file it as such, and a declaratory judgment can properly be entered even though it does involve a question of enjoining the collection of taxes; and the fact that we have a Nebraska statute that says that you shall pay taxes under protest and seek to recover them back after having been denied relief on a claim to the Board of County Commissioners, I don't think takes it out of the category of issues to which declaratory judgment can apply so as to prevent the declaratory judgment chapter from being applicable to the controversy presented here, and the mere fact that the law does provide for paying taxes under protest, filing a claim with the county board for refund and having that denied and appealing in order to get relief from the tax would not preclude the application of the declaratory judgment law. Neither do I think that there is a defect of essential or indispensable parties to this action. Perhaps if the mortgagee had been made a party defendant they might have been in here making some showing in opposition to the tax, or they might have on the other hand said, "We don't want to have anything to do with it," disclaim any interest in it; but I don't think they are such an essential party as would constitute a defect of parties that would prevent the Court from going ahead and passing on the issues. The issue here is really between Sarpy County and the county tax collector, the

county treasurer, on the one hand, and the plaintiff, who is called upon to pay the taxes, if rightly assessed, on the other hand, rather than the mortgagee, who certainly wouldn't be paying this alleged tax; and the fact that the state is not made a party, I do not think is a fatal defect. If the state had to be a party here, we would have to find some special statute that would permit joining the state, because they have not consented to the suit and hence can hardly be an essential party, and I do not think that there is a material defect of indispensable parties that would prevent the Court from passing on the controversy presented.

Then we come to the actual merits of the controversy. In my opinion I do not think there is any question here but what exclusive jurisdiction was ceded by Nebraska to the United States Government on the additional land site that was acquired as a part of Offatt Air Base upon which to accommodate at least a part of this housing project, the rest of it being on other land constituting part of the original Offutt Air Force Base, but it is within the military reservation and exclusive jurisdiction has been ceded by Nebraska to the United States Government; that exclusive jurisdiction, of course, precludes the power and right of levying and collecting taxes, unless consent by Congress to taxing the property has been given.

Now, the situation here also raises the question of whether you classify Offutt Air Force Base a part of the public lands of Nebraska; I mean that is one of the things we are asked to have a declaration on. You certainly do not so classify it unless you are going to depart entirely from the unbroken line of U. S. decisions to the contrary; a permanent military base is not a part of the public lands; that applies only to lands remaining for disposition. That conclusion seems uniform in the decisions. So, in attempting to tax improvements on the

Offutt Air Force Base, as improvements on public lands and make it fit Section 77-1209 of our statutes it just don't quite fit, because Offutt Air Force Base is not a part of the public lands as defined by the adjudicated cases, an unbroken line of decisions cited in plaintiff's brief. Surely that section covers the school lands in Nebraska without question, and that is where most of your taxes under that section of the statute are assessed; those school lands remain for sale and disposition; but that statute would not permit you to levy taxes for instance upon some private property on Offutt Air Force Base, or any other permanent military installation which had been set apart from public lands and no longer is public lands subject to disposition or sale.

That brings us to the question of whether or not there has been any consent to tax given by Congress. Here we have two different types of property involved. The tax schedule for the year 195[illegible] lists some appliances and some office furniture on the personal tax schedule, in another place it lists improvements on leased ground, and refers to another place in the same schedule as apartment houses. Under the terms of the lease in question the actual legal title to the apartments, the dwelling units, the buildings themselves, is in the United States Government, exactly the same as it is on the land, so that as far as taxing the apartment houses, the buildings themselves, that would be directly taxing United States Government property; as far as taxing the improvements on leased ground, you would be attempting to tax United States Government property—to me that seems plain—and you have a clear distinction between that situation and the *Meade Heights* case in Maryland, which was just exactly the contrary; by the specific terms of that lease the buildings thereon remained the property of the Meade Heights Corporation, and so remained—with the privilege of re-

moval thereof at the termination of the lease, and did not become the property of the United States Government; so that as far as the *Meade Heights* case being authority for taxing the improvements consisting of the housing units on Offutt Air Force Base, not only do you find that distinction where the Meade Heights buildings belonged to Meade Heights, Incorporated, a private corporation, with the privilege of removing them if they were still there at the end of 75 years, the termination of the lease, but you, of course, also had a quite different provision in the constitution and statutory law of Maryland, which we don't seem to have here, that expressly provided that the State of Maryland had the right to tax property of the United States government wherever possible and to the fullest extent, rather than foregoing any right to tax leasehold interests in real estate by express statutory provision; and to me the *Meade Heights* case is no precedent to follow here because in the first place we do not have the same statutory law as Maryland did granting authority to the fullest extent possible to tax property of the United States Government; and secondly the lease there involved was apparently the forerunner and predecessor of this one, on which there has undoubtedly been some studied effort to avoid situations just like Maryland where the property was not the United States Government's property at all, but was the property of the private corporation, and as such held to be taxable, but at the same time recognizing that the land on which it was situated was not taxable because it belonged to the United States Government; and even notwithstanding the stronger Maryland statutory provision, that did not permit the state of Maryland there to tax the ground on which it was situated. In fact, the controversy seemed to be whether or not they should tax the full interest in the value of the buildings, because of restrictions on occupancy, etc.

The Florida case—also cited on behalf of defendants—of course involves a similar lease in a back-handed way, but that was a sales tax on the building materials that went into the project. Neither does our case conform to the *Tampa Bay Gardens Apartment* case in Florida, which was a housing rental tax, not an ad valorem property tax. For all we know maybe the ad valorem property tax in Florida is so insignificant as not to justify litigation when compared to the housing rental tax imposed. Florida also collected a sales tax on the materials and may even have an income tax which they may assess on the income from the apartments so that they get two or three cracks at taxing under their statutory provisions that we do not have in Nebraska.

With reference to the apartment houses, the buildings, the physical improvements themselves, it seems to me that definitely they are property of the United States Government, and are beyond the power of Sarpy County to tax as such. If the apartment houses are considered as improvements on leased ground I am purposely not making any commitment as to whether there might be some taxable leasehold interest. If our law permits the taxing of the value of a lease held by an individual, that, in my opinion, is the very most that Congress has given any consent to tax, if they have given any consent at all under the Wherry Housing Act. As brought out in defendant's reply brief, the provision in the 1947 act with reference to the leasing of real or personal property of the United States Government in any one of the branches of the service for a five year period, or whatever duration the secretary of the particular service concerned concluded, specified that it must be such as was determined not to be surplus, because if it was determined to be surplus of course it would be sold by the secretary—of the Air Force, for instance—in the particular case in

which he had jurisdiction, and for the time being was not needed for a public use. That was the character of property to which in that Act express consent was given that the interest of the lessee of that character of property shall be made subject to state and local taxation.

And, now, what do we have here? We have United States Government property, not that is surplus property being sold and disposed of completely as surplus property, not needed for public use, but we have United States Government property that is being devoted to a public use for the housing of military personnel, and is certified to be needed for that purpose; not certified not to be needed for a public purpose; so that in my mind, without making any definite commitment now, there would be a serious and doubtful question as to whether there ever was any consent given to tax a leasehold interest in this particular property, where it is being devoted to a public use for housing of military personnel, under the provision of the 1947 act that pertained to the consent being given to make the lessee's interest taxable where it was not needed for a public use for the time being; and that is the only consent that can be pointed to. Sure! the *Meade Heights* case says that language of the act is plain; and as far as the *Meade Heights* case is concerned it was plain enough, because the *Meade Heights* involved the assessment of physical improvements, buildings, that belonged to somebody else, not the Government at all, they belonged to the Meade Heights Corporation.

The Florida case, involving the sales tax, indicates it doesn't find too much difficulty in that consent section being plain language and that it doesn't need any construction; yet so far as fitting the facts of the Florida case to our case, they just do not fit at all; that case involved a sale tax on materials that went into the con-

struction before the building was ever built. They say the building became for all practical purposes not a Government building, but a privately owned building held by private enterprise for private gain; but to what extent is that anything more than dicta of the Florida Supreme Court so far as an ad valorem property tax is concerned. Maybe our court will say the same thing, but I doubt it very much.

The personal property items here, consisting of office furniture and appliances, are admittedly owned by the plaintiff, Offutt Housing Corporation; they are physically located within military reservation, and in my opinion the construction of the consent statute—of the consent section of the statute involved—certainly cannot be extended to include such property because that property is not even owned by the United States Government. What consent was being granted? Consent to lease Government owned real and personal property. That is the consent that you are talking about in that section of the 1947 Act pertaining to the leasing of real and personal property of the Government. The Government never owned the appliances. The Government never owned Offutt Housing Company office furniture and cash register and desk, that are listed at $205.00 on the tax schedule; so that the matter of giving consent to taxing of leased personal property would not be applicable to the personal property involved in this case at all, if there is by proper construction a consent of Congress even granted.

This brings us down to the point that so far as personal property is concerned it is privately owned personal property physically located upon a permanent military base, Offutt Air Force Base, and I cannot see that there is any reason why the Court should follow a state court decision such as the Maryland case instead of adhering to the last

pronouncement of the United States Supreme Court on this question. The U. S. Supreme Court seems to be quite consistent in holding that private personal property located upon and within a permanent military base is beyond the jurisdiction of the state to tax, as held in *The Surplus Trading Corporation* v. *Cook* case. Admitting it to be privately owned personal property, individual property, located within the confines of the military installation over which the State had ceded exclusive jurisdiction to the United States Government, and in the absence of finding express consent by Congress to tax the privately owned personal individual property of Offutt Housing Company, a corporation, physically located within the confines of the military base, I do not think the State or Sarpy County has authority to tax it, because so far as that property is concerned it has been placed beyond the power to tax without consent and by no construction that I can find of the consent section of the 1947 act, or any subsequent Act, has consent been given to tax other than the interest of the lessee in real or personal property of the United States that is leased as not now being needed for a public purpose; so that certainly wouldn't be applicable to the personal property involved in this matter here.

In going through the various sub-paragraphs of the prayer of the plaintiff's amended and supplemental petition my decision will encompass granting the specific relief asked in each one of those subparagraphs, because there is no place in any of them that asks this Court to determine and declare whether or not a leasehold interest in Nebraska or in the housing project in question is a taxable item of property; that is not sought to be determined here, and I do not want to preclude myself, or preclude the parties, from such being a potential question for future determination. The mere fact that in a life lease, which we refer to as a life tenancy, that under the law in Nebraska it is the

obligation of the life tenant to pay the taxes on the fee title to the property wouldn't necessarily control if it was a lease for a term less than life, such as a term of years, even if it was 99 years, or 75 years, so far as such lease representing separate property of value subject to taxation apart from the fee title. Before the termination of the lease you have an item of property, probably, that does represent some value, even when you have a one year lease on a farm, there is some value to your lease. Whether that is an item of property that the Nebraska statute contemplates could be segregated for taxes, or whether a 75 year lease on an apartment building, or office building, could be segregated for taxes is not determined; merely that it isn't done doesn't necessarily mean that it couldn't be done; or merely because it would become a complex problem to figure out the proper value for such lease wouldn't necessarily mean it isn't an item of taxable property; yet in my view that question is not presented here and is not being passed upon; and certainly by no stretch of reasonable construction can the listing of improvements on leased property, or the listing of apartment houses, as was done on the 1952 personal property tax schedule return by the assessor for the plaintiff in this case, be properly construed to be returning for taxation the value of a leasehold interest therein. It is attempting to tax the improvements themselves, which I say you can not do because they belong to the United States Government and that has removed them beyond the field of Sarpy County to tax without consent, and I am not making any commitment as to whether or not Sarpy County could tax the value of a leasehold interest in something to which possibly Congress has consented; I do not know what the value of such leasehold interest would be, but that is something that does not have to be passed upon at this time in order to decide the issues in the case presented, and I think the granting of the

relief in each of the sub-paragraphs in plaintiff's petition doesn't necessarily pass on that question, because that is not even sought to be ruled upon.

You can prepare a decree accordingly, Mr. Reed and Mr. Selling, and submit it to Mr. Entenman; but the gist of my holding is that the controversy does represent a justiciable issue between the parties that is cognizable in this court and on which a declaratory judgment can be entered, and that there is no defect of parties that prevents the Court from entering a judgment, and that the attempt to tax improvements on leased property, or apartment houses, comprising the dwelling units at Offutt Air Force Base is an attempt to tax property the title to which is in the United States of America and there has been given no consent by Congress to taxing the land or the improvements thereon, or the apartment houses thereon, whichever you want to say, as such, and that so far as the appliances are concerned, and the office furniture also listed on the same personal tax schedule for taxation, that they are privately owned property of the plaintiff corporation without dispute, and they are within the military confines of the Offutt Air Force Base and there has been no consent given by Congress to tax the privately owned property of Offutt Housing Corporation within the physical confines of the military base; so that in effect the plaintiff has prevailed in this litigation, and I frankly state that the matter is difficult, and it has been confusing, and I am only happy for Sarpy County that it isn't a matter where they have had this item of valuation on the tax books for two or three million dollars for the last ten years and would now be losing it from the tax rolls. This is something you never had on the tax books before; certainly it isn't representing the character of loss as if you had it on the tax books and found that it was deeded to a charitable or educational institution out from under you and you would lose that much

valuation. To me it is just a question of the exclusive jurisdiction having been granted and ceded to the United States of America and there has to be consent of Congress before you can tax; and that there is not consent of Congress to tax any one of the items listed on the schedule involved; there has been no consent whatever to tax improvements on leased property, or to tax privately owned chattel property of Offutt Housing Company; the only consent would pertain to the consent to tax a leasehold interest in property that was not surplus and for the time being not needed for public use, and that is the limit of the consent that has been given; and of course you can't rely upon the consent to tax if this property ever becomes vested in the name of the FHA Commissioner, that is something that doesn't currently prevail, and you would have to cross that bridge when the time came and the FHA Commissioner became vested with the title, which isn't the circumstances as they exist in this case at the present time. The fact that the Attorney General of Florida says they have had no difficulty in all four or five Air Force bases in Florida on which there are similar housing projects, not even an attempt made to question the *ad valorem* property tax, that has been levied on similar housing units, doesn't necessarily in my mind mean that they do not have a right to resist it; for all we know, as I say, it may be of such insignificance, a nominal amount, that it isn't even worth litigating as compared to the fact that they do have other forms of taxes which obviously do reach substantial value in those kind of projects, one of them being disclosed by this Tampa Bay Gardens Apartment proposition where they proposed and made stick a housing rental tax; maybe they taxed the income too, I don't know whether Florida has an income tax law or not.

One other case that I know Mr. Entenman has specifically mentioned is the Minnesota case, which is a United States

Supreme Court decision, but that case does not fit at all, in that there you have a Government piece of property that is what you might compare to surplus property being disposed of, it had been sold to a private individual and the government retained the naked legal title for security purposes. This property has not been sold by the United States Government, it is going to belong to the United States Government from on out, unless there is a default in the mortgage. The property involved in the Minnesota case was surplus, at least it would be analogous to surplus property the government didn't need for anything, and they went ahead and sold it to a private individual, who was using it himself and to the extent that he had the beneficial ownership of it, the property was subjected to taxation as the Government retained only the naked legal title as security for the payment of the balance of the installments as they became due on the purchase price; that was held to be perfectly proper, that it be taxed by the state of Minnesota; I do not think that is analogous to our situation in the instant case. So far as the security of our mortgage is concerned it is more comparable to the revenue bonds that are issued against a public utility; the lines and poles, the physical items, if you salvage them, they wouldn't be worth five cents on the dollar as security for your bond issue, but your security for the bond issue is the income or revenue the property produces; and that is exactly the real character of the security they have for this mortgage on Offutt Housing Project—not the physical property itself, because that belongs to the Government; the mortgagee as a practical matter will have to rely upon the income from that property to pay off the mortgage, and if it fails to do so then the FHA Housing Commissioner is going to take it over.

Mr. Entenman: But the power of sale is there.

By the Court: Yes, that is true.

Mr. Entenman: And that word "Sell" is in all those acts.

By the Court: And when the time comes the FHA Commissioner is obliged to take it over, then is when the provision of taxable the same as any other property will come into play, into being; it doesn't pertain to this case at all so far as Offutt Housing Corporation's obligation to pay on the mortgage that it has given. It is a matter where its obligation is really limited to the revenue it gets off of that property, isn't it? as the only source of income from which it is going to pay the installments as they become due on that mortgage.

Mr. Reed: Only security.

By the Court: That is the only substantial security for that mortgage. Just like if you would float a bond issue on the Nebraska City Utilities; there isn't very much security to the poles and the lines if you tore them down and sold them; they wouldn't bring five cents on the dollar; the bond issue is based upon the revenues that are being produced by that utility as a going concern; that is the practical angle.

Mr. Entenman: That might be the practical angle; but legally you don't mean to say the Manufacturers Trust took a five million dollar mortgage here without the right to ever acquire that property?

By the Court: No, not without the right to ever acquire it, but I say their principal security and source of receiving payment isn't the bricks and buildings over there; their principal security and source of receiving payment is the rents from that housing project, just like the source of payment on the bond issue of the Nebraska City Utilities is the income that it produces, not the salvage value of a pile of poles and wires.

(Followed by general off the record discussion between Court and counsel.)

CERTIFICATE:

I, Roy J. Peterson, Official Court Reporter of the Second Judicial District of Nebraska, do hereby certify that the above and foregoing is a true and correct transcript of my notes taken of the proceedings had in the above entitled matter; the same having been recorded by me in shorthand at said time, and thereafter extended by me into typewritten longhand as above set forth.

Dated this 10th day of June, 1954.

/s/ ROY J. PETERSON,
Official Court Reporter of the Second Judicial District of Nebraska.

(Note: The foregoing opinion was rendered by Judge John M. Dierks.)

IN THE DISTRICT COURT OF SARPY COUNTY, NEBRASKA.

OFFUTT HOUSING COMPANY, A Corporation, *Plaintiff*, *vs.* COUNTY OF SARPY and ROBERT M. EBY, Treasurer of County of Sarpy, Nebraska, *Defendants.*	Doc. U. Case No. 6685. Page 350.

JUDGMENT AND DECREE.

Now on this 15th day of June, 1954, the same being one of the days of the May 1954 term of court, this cause came on to be heard on the amended and supplemental petition of the plaintiff, the answer of the defendant, Robert M. Eby, the amended answer of the defendant, County of Sarpy, and the plaintiff's reply to the amended answer of the defendant, County of Sarpy, and the evidence, and was submitted to the court, and the court being fully advised in the premises finds generally for the plaintiff and against the defendants, and each of them.

After due consideration of the evidence, the court finds:

That the allegations contained in plaintiff's amended and supplemental petition are true.

That the allegations contained in paragraphs III, X, XII, XV and XVI of the amended answer of the defendant, County of Sarpy, are true and that the allegations contained in paragraphs VI, VII and VIII of plaintiff's reply to amended answer of defendant, County of Sarpy, are true and that the deed filed on April 12, 1950 and recorded in Deed Records 67 at page 537 in the office of

the Register of Deeds of Sarpy County, Nebraska, was executed by the grantor named therein on the 21st day of October 1949.

The court further finds:

That the court has jurisdiction of the subject matter of the action.

That the court has jurisdiction over the parties to this action.

That the controversy between the parties is justiciable in this action.

That there is no defect of essential parties.

The court specifically finds:

That Offutt Air Force Base is a military reservation of the United States and it has, at all times herein involved, been actively and exclusively used as a purely military installation.

That the Department of the Air Force has certified Offutt Air Force Base to be a permanent part of the United States Air Force and that the Secretary of the Air Force, previous to the erection of the housing units involved, certified that such housing project was necessary for the use of personnel assigned to Offutt Air Force Base.

That all property involved is located on Offutt Air Force Base.

That the land on which Offutt Air Force Base is located is real property of the United States.

That the rental units involved were needed at Offutt Air Force Base and that the rentals therefor are substantially less than the rentals for comparable private available housing.

That the project was initiated by the Commanding Officer of Offutt Air Force Base determining the rental housing need for its military personnel, the later approval of the

project by the Secretary of Air, followed by determination of project details by the Air Force and the Federal Housing Administration, after which prospective sponsors were invited to provide the approval number of rental housing units, after which Carl C. Wilson, Inc., one of four prospective sponsors, was selected, Carl C. Wilson, Inc. not being the preference of the Commanding Officer of Offutt Air Force Base. Thereafter, in accordance with existing law and Federal Housing Administration regulations, the sponsor caused the plaintiff corporation to be organized to act as lessee for the military rental housing project.

That the housing project was conceived and planned and that the additional necessary land was secured through the Omaha Chamber of Commerce before any sponsor or lessee was selected or established.

That the maximum rentals to be paid by the occupants of the housing project were determined on the basis of the ability of prospective military tenants to pay, and that before the sponsor of the project was selected, the prospective lessee, the plaintiff, was required to conform to the rental schedule prescribed by the Department of the Air Force of the United States of America.

That the amount of rentals which the plaintiff may charge for occupancy of the housing units involved was fixed by the Federal Housing Administration Commissioner in accordance with Title VIII of the federal National Housing Act and the regulations of the Federal Housing Administration Commissioner with concurrence of the Department of the Air Force of the United States of America.

That the rentals to be paid by the occupants of the rental housing units in said project cannot be raised without the consent of the Department of the Air Force of the United States of America.

That the housing units and the equipment involved is presently leased only to military personnel of the United States of America assigned to duty at Offutt Air Force Base.

That the amount of rentals charged to the occupants of the rental housing units were fixed upon the assumption that the property was not taxable and that, in the event the property involved in this action should be found to be taxable, rentals paid by Air Force personnel tenants will be increased.

That the eligibility of Air Force personnel to rent the property involved is determined by the Strategic Air Command Base Commander.

That the property involved is not located in any municipality or school district.

That upon receipt by Governors of the State of Nebraska of notification letters, copies of which were introduced in evidence as Exhibits 2 and 2-A, the United States of America assumed exclusive jurisdiction over Offutt Air Force Base and over all property involved in this action, and that upon receipt of such notification letters, the State of Nebraska, and its political subdivision, County of Sarpy, ceded all taxing jurisdiction over Offutt Air Force Base to the United States of America and all property located thereon.

That the United States of America has never by legislative action consented to the defendant, County of Sarpy, taxing the buildings involved in this action or the appliances and personal property of the plaintiff located therein.

That the United States of America has never by legislation action consented to the defendant, County of Sarpy, taxing any tangible personal property of the plaintiff located on Offutt Air Force Base.

That the mortgage executed by the plaintiff is not a mortgage on the fee title to the land leased to the plaintiff.

That on June 23, 1952, the rental housing units involved in this action were fully completed and that all 611 rental housing units involved therein had been certified as ready for occupancy and that on said date, a large number of such rental units were already occupied by Air Force Personnel assigned to Offutt Air Force Base.

That in connection with the plaintiff being established as lessee of the rental housing project on Offutt Air Force Base and being granted a lease of the land on which the project was to be erected, the Department of the Air Force required the plaintiff to agree that the rentals paid by the tenants of the rental housing units should include the use of household appliances to be furnished by the plaintiff, including gas ranges, refrigerators, washers and dryers.

That on March 10, 1952, a number of the buildings and rental housing units therein had been fully completed and were occupied by Air Force personnel assigned to Offutt Air Force Base and that on said date, all of the buildings had been structurally completed, except for some remaining painting, plastering and plumbing connections in some of the rental housing units contained therein.

That the plaintiff, in 1952, did not list with the County Assessor of Sarpy County any property involved in this action as personal property of the plaintiff subject to taxation in Sarpy County and that on June 23, 1952, the County Assessor of the defendant, County of Sarpy, without plaintiff's consent or authority, executed a purported "Business and Professional Schedule of Personal Property," purported to be owned by the plaintiff and subject to taxation in Sarpy County as personal property

of the plaintiff and that the property described in such Business and Professional Schedule is the property involved in this action.

That said schedule listed under subdivision F thereof miscellaneous personal property at a valuation of $205.00 and household appliances at a valuation of $69,695.00 and that in such schedule in subdivision I thereof, there was listed "Improvements on leased land" at a valuation of $755,785.00.

That the improvements were assessed at the assessor's estimate of the value of the buildings, the same as if the plaintiff had a full and unqualified ownership of the buildings.

That on the basis of such schedule, purported taxes were levied against the plaintiff in the amount of $10,783.45. That $9,870.55 of such tax covers improvements on leased land at Offutt Air Force Base and balance of the tax, or $912.90, covers taxes levied against the plaintiff on property listed under subdivision F of such "Business and Professional Schedule of Personal Property."

That no part of said taxes have been paid.

That prior to the bringing of this action, the defendant, Robert M. Eby, Treasurer of the defendant, County of Sarpy, by a letter dated April 13, 1953, threatened to issue a distress warrant to collect the purported taxes involved.

That plaintiff is entitled to the relief prayed for.

THEREFORE, IT IS DECLARED, DETERMINED AND ADJUDGED THAT:

Offutt Air Force Base is property reserved or acquired and used by the United States for military purposes.

The State of Nebraska and its political subdivision were, in 1952, and thereafter, without power or authority to tax tangible property located at or upon Offutt Air Force Base.

Offutt Air Force Base, the land on which it is located, and rental housing improvements thereon were, on June 23, 1952, and at all times thereafter, property of the United States, not subject to taxation by the State of Nebraska or Sarpy County.

On June 23, 1952, and at all times thereafter, rental housing improvements on Offutt Air Force Base were real estate and not personal property and was a part of the land on which Offutt Air Force Base is located.

The land on which Offutt Air Force Base is located was not, during any time during 1952, a part of public lands.

The purported 1952 assessment of "Improvements on leased lands * * * $755,785.00" as personal property of the plaintiff was illegal, null and void and of no effect.

The purported 1952 levy of taxes against the plaintiff by the defendant on improvements on leased land of the purported value of $755,785.00 was illegal, null and void and of no effect.

The purported property of the plaintiff listed under Schedule F of the purported personal property tax schedule as property subject to taxation in Sarpy County under the laws of the State of Nebraska was illegal, null and void and of no effect.

The purported property of the plaintiff listed under Schedule F of the purported personal property tax schedule as property subject to taxation in Sarpy County, Nebraska, was located on Offutt Air Force Base and was not subject to taxation by the defendant, County of Sarpy.

The purported 1952 levy of taxes against the plaintiff on the property listed in Schedule F of the purported personal property tax schedule was illegal, null and void and of no effect.

The purported personal property tax schedule made by

the County Assessor of Sarpy County showing personal property of the plaintiff subject to taxation in Sarpy County under the laws of the State of Nebraska should be corrected to eliminate therefrom improvements on leased land of the valuation of $755,785.00.

The purported personal property tax schedule made by the County Assessor of Sarpy County showing personal property of the plaintiff subject to taxation in Sarpy County under the laws of the State of Nebraska should be corrected to eliminate therefrom property listed in Schedule F thereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT:

The defendant, County of Sarpy, its officers and agents, be perpetually enjoined from including in its tax assessment schedules any rental housing improvements on Offutt Air Force Base as personal property of the plaintiff in Sarpy County.

The defendant, County of Sarpy, its officers and agents, be perpetually enjoined from including in its tax assessment schedules any furniture, fixtures, tools, equipment or household appliances located on Offutt Air Force Base as personal property of the plaintiff taxable in Sarpy County.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant, County or Sarpy, its officers and agents, and the defendant, Robert M. Eby, Treasurer of Sarpy County, be perpetually enjoined from levying any tax against the plaintiff covering improvements located on Offutt Air Force Base or enforcing any tax thereon against the plaintiff.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, County of Sarpy, its officers and agents, and the defendant, Robert M. Eby, Treasurer of Sarpy County, be perpetually enjoined from levying any tax against the

plaintiff covering furniture, fixtures, tools, equipment or household appliances located on Offutt Air Force Base.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the purported personal property tax schedule made by the County Assessor of Sarpy County on June 23, 1952 be corrected to eliminate therefrom improvements on leased land of the valuation of $755,785.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the purported personal property tax schedule made by the County Assessor of Sarpy County on June 23, 1952 be corrected to eliminate therefrom furniture and fixtures—tools and equipment—household appliances of the valuation of $69,900.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff recover from the defendants its cost in this action taxed at $28.35.

BY THE COURT

/s/ JOHN M. DIERKS,
Judge.

C.

OPINION AND JUDGMENT OF THE SUPREME COURT OF NEBRASKA.

OFFUTT HOUSING COMPANY
vs.
COUNTY OF SARPY
} 33658

Filed May 6, 1955.

1. The levy, assessment, and collection of taxes which are demonstrably void for want of jurisdiction or authority to impose the same may be enjoined.

2. Generally, the state's immunity from suit in its own courts without its consent is unaffected by declaratory judgment statutes, but such an action may be maintained under statutes which permit actions against the state.

3. By the enactment of Title 12, U. S. C. A., section 1748d, and other statutes in pari materia therewith, the Congress of the United States has receded to the state the power and authority to tax a lessee's interest in a housing project located on real property owned by the government of the United States which has been leased by it to private industry for the construction, maintenance, operation, and rental of military housing units by the lessee for its own use and profit.

4. The meaning of the words "public lands" varies in different statutes enacted for different purposes, and they should be given such meaning in each as comports with the intention of the Legislature in their use.

5. The term "leased public lands" as used in section 77-1209, R. R. S. 1943, for purposes of taxation, means "lands belonging to the public, which have been leased as authorized by law."

6. Also, the words "owner of such improvements" as used in section 77-1209, R. R. S. 1943, for purposes of taxation, include "any lessee who has the dominion or control thereover for his own use and profit during the useful life thereof."

Heard before Simmons, *C. J.*, Carter, Messmore, Yeager, Chappell, Wenke, and Boslaugh, *JJ.*

CHAPPELL, *J.*

Plaintiff, Offutt Housing Company, a corporation, brought this action against defendants, County of Sarpy and Robert M. Eby, its county treasurer, seeking a declaratory judgment determining that a 1952 tax levy and assessment made by the county upon plaintiff's personal property located within the Offutt Air Force Base was void; to enjoin collection thereof; and to permanently enjoin any levy and assessment of taxes thereon. After trial upon the merits, a judgment was rendered which found and adjudged the issues generally in favor of plaintiff and against defendants, and awarded the relief sought by plaintiff. Defendants' motion for new trial was overruled and they appealed. Numerous errors were assigned, the effect of which was to assert that the judgment was not sustained by the evidence but was contrary thereto and contrary to law. We sustain the assignments.

At the outset we are met with defendants' contention that by reason of section 77-1727, R. R. S. 1943, plaintiff could not maintain injunction. In *Hemple* v. *City of Hastings*, 70 Neb. 723, 113 N. W. 187, it is said after referring to cited cases and such section: "It was settled that, where a tax is void, i.e., where there is no tax which the plaintiff is in equity bound to pay, he may invoke the aid of a court of equity to protect his rights by injunction, notwithstanding such provision. *Earl* v. *Duras*, 13 Neb. 234; *Bur-*

lington & M. R. R. Co. v. *Cass County*, 16 Neb. 136; *Touzalin* v. *City of Omaha*, 25 Neb. 817; *Bellevue Improvement Co.* v. *Village of Bellevue*, 39 Neb. 876." Other comparable Nebraska cases too numerous to cite here are cited and comprehensively discussed in *Mid-Continent Airlines* v. *Nebraska State Board of Equalization & Assessment*, 105 F. Supp. 188. As indicated therein, this court has uniformly upheld the right to enjoin taxes which are demonstrably void for want of jurisdiction or authority to impose the same, as distinguished from those which are not void but simply irregular or erroneous. We conclude that the remedy of injunction is available, provided the evidence and applicable law warrants its employment.

Relying solely upon section 25-21,159, R. R. S. 1943, defendants also argued that the state was a necessary party defendant, thus there was a defect of parties. We conclude that the contention has no merit. No claim is made in this case that any statute is unconstitutional, requiring opportunity for the Attorney General to be heard. As stated in *Northwestern Mutual Life Ins. Co.* v. *Nordhues*, 129 Neb. 379, 261 N. W. 687: "Section 22, art. V of the Constitution provides: 'The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought.' Under this provision no suit can ordinarily be maintained unless authorized by legislative provision. The state cannot be sued in its own courts without its consent. *State* v. *Mortensen*, 69 Neb. 376; *McShane* v. *Murray*, 106 Neb. 512; *McNeel* v. *State*, 120 Neb. 674; *Eidenmiller* v. *State*, 120 Neb. 430."

Section 24-319, R. R. S. 1943, waived that prerogative in some respects, but this action does not come within its purview. It has been held that: "Generally, an action for a declaratory judgment cannot be maintained against the state without its consent, the state's immunity from suit

being held unaffected by declaratory judgment statutes; but such an action may be maintained under statutes permitting various actions against the state." 81 C. J. S., States, s. 214, p. 1304, and authorities cited. It has also been held that: "Ordinarily, general rules as to proper and necessary parties in civil actions apply in taxpayers' suits." 30 C. J. S., Counties, s. 291, p. 1244.

On the other hand, as provided in section 23-101, R. R. S. 1943: "Each county, established in this state * * * shall be a body politic and corporate * * * and by that name may sue and be sued, plead and shall be impleaded, defend and be defended against, in any court having jurisdiction of the subject matter, either in law or equity, or other place where justice shall be administered." No exception thereto is operative herein. This court has uniformly entertained jurisdiction in cases brought to enjoin the collection of void taxes wherein only the county in which the property is located and the county treasurer thereof have been made parties defendant. *Rothwell* v. *Knox County*, 62 Neb. 50, 86 N. W. 903; *Y.M.C.A. of Omaha* v. *Douglas County*, 60 Neb. 642, 83 N. W. 924, 52 L. R. A. 123. See, also, 28 Am. Jr., Injunctions, s. 275, p. 450.

In 1949 Congress enacted Chapter 403, Public Law 211, generally referred to as the Wherry Housing Act. As amended, it now appears as Title 12, U. S. C. A., section 1748 to 1748i. The primary purpose of the legislation was to procure the construction, operation, and maintenance by private industry of adequate housing facilities for rental to civilian and military personnel of the army, navy and air force. The main impetus for such construction was supplied by provisions of the act which authorize the Federal Housing Commissioner, after appropriate certification of necessity as a permanent part of a military establishment with no intention to substantially curtail activities thereat,

insure a first mortgage on real estate in fee simple or a leasehold for an amount generally not to exceed five illion dollars, and not to exceed 90 percent of the re-acement cost of the property or project when completed.

Section 1748d, insofar as important here, provides that: Whenever the secretary of the * * * Air Force determines at it is desirable to lease real property within the mean-g of sections 626s-3 to 626s-6 of Title 5, * * * to effectu-e the purposes of this subchapter, the Secretary con-rned is authorized to lease such property under the au-ority of sections 626s-3 to 626s-6 of Title 5, * * * upon ch terms and conditions as in his opinion will best serve e national interest without regard to the limitations im-osed by said sections in respect to the term or duration the lease, and the power vested in the Secretary of the epartment concerned to revoke any lease made pursuant said sections in the event of a national emergency de-ared by the President shall not apply. Whenever the ecretary of the * * * Air Force determines it to be in the terest of national defense, he is authorized to sell, trans-r, and convey at fair value (as determined by him), for e under this subchapter, all or any right, title, and in-rest in any real property under his jurisdiction, *not-ithstanding any limitations or requirements of law with spect to the use or disposition of such property. The uthority conferred by this section shall be in addition to nd not in derogation of any other power or authority of the ecretary of the * * * Air Force.*" (Italics supplied.)

In that connection, section 1748f, also provides: "Noth-g in this subchapter shall be construed to exempt any al property acquired and held by the Commissioner under is title from taxation by any State or political subdivision ereof, to the same extent, according to its value, as other al property is taxed." Such section is not controlling

under the factual situation presented in the case at bar, but it does have application, to be considered as a circumstance in connection with others, indicating the intent of Congress that such housing projects should in any event bear their just proportion of state and local taxation.

Further, however, section 626s-6 of Title 5, specifically referred to and incorporated in Title 12, section 1748d, provides: "The lessee's interest, made or created pursuant to the provisions of sections 626s-3 to 626s-5 of this title, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of said sections shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated." The first sentence of such section specifically makes lessee's interest subject to state and local taxation. However, the latter sentence has application only in the event that Congress should subsequently consent to taxation of the interest of the government in addition to the interest of the lessee. In that connection, as stated in *Meade Heights* v. *Tax Commission of Maryland*, 202 Md. 20, 92 A. 2d 280: "As we read this provision, it called for renegotiation only in the event that Congress should consent to taxation of the government's interest in addition to that of the lessee, which is recognized as fully taxable as of the date of execution." As hereinafter observed, section 8 of plaintiff's lease involved herein so recognized that construction.

Only plaintiff lessee's interest in the housing project, together with the fixtures thereof and its personal property used therein, is involved in this case. In other words, contrary to plaintiff's contention, this is not a case where the county has attempted to tax government property, but rather has taxed plaintiff's private property located on

an air force base wherein, as heretofore and hereinafter observed, the right to do so was specifically re-ceded by the Congress of the United States.

The facts are not in dispute. Plaintiff is a perpetual private Nebraska corporation, organized December 22, 1950, by one Carl C. Wilson and two other persons living in Omaha. Its authorized capital stock was $800,000, consisting of 80,000 shares, having a par value of $10 per share. Ten such shares were designated as "Preferred Stock." The rest was "Common Stock." Its principal place of business was designated as in Omaha. The general nature of its business was to provide housing for rent or sale, to acquire any real estate or interest or right therein, or appurtenances thereto, and any and all personal property in connection therewith; to improve, operate, and sell, convey, assign, mortgage, or lease any real estate and personal property; to borrow money and issue evidence of indebtedness in furtherance of any and all of the objects of its business, and to secure same by mortgage, deed of trust, pledge, or other lien; and "To apply for and obtain or cause to be obtained from the Federal Housing Commissioner a contract or contracts of mortgage insurance pursuant to the provisions of the National Housing Act as amended, covering bonds, notes and other evidences of indebtedness issued by this corporation and any indenture of mortgage or deed of trust securing the same. So long as any property of this corporation is encumbered by a mortgage or deed of trust insured by the Federal Housing Commissioner it shall engage in no business other than the construction and operation of a Rental Housing Project or projects."

Carl C. Wilson is president of plaintiff corporation. He is also president of another private corporation, called "Carl C. Wilson, Inc." The latter corporation was se-

lected as the building or construction contractor. It constructed the 611 modern housing units here involved for plaintiff corporation, and was compensated therefor by it. The Federal Housing Administration's amended Project Analysis, dated January 24, 1951, estimated that compensation required to be paid the building corporation for such construction would be $285,750. It estimated that plaintiff's net annual income from rentals, with 97 percent occupancy, after payment of maintenance, operating expenses, and taxes, would be $326,798. It estimated that the maximum insurable mortgage on plaintiff's interest in the project should be $4,949,100. In conformity with the Wherry Housing Act, the Secretary of Air Force certified that the average monthly rental charged and collected by plaintiff should be and was $71.04 per unit, which at 100 percent occupancy would gross $520,865.28 per year.

On January 18, 1951 the Secretary of the Air Force and plaintiff corporation entered into a lease whereby plaintiff was leased some 63 acres of described land on Offutt Air Force Base for a period of 75 years at $100 a year, "to be used for the purpose of erecting, maintaining and operating a housing project, consisting of approximately 611 units, substantially in accordance with the outline plans and specifications submitted to the Department of the Air Force and in accordance with the detailed plans and specifications to be approved by the Federal Housing Commissioner * * *." Forty-eight acres of such described land had been previously deeded to the United States by the Omaha Chamber of Commerce and the Air Force had appropriately taken exclusive jurisdiction thereof.

The lease required: "That an application for mortgage insurance under Title VIII of the National Housing Act,

as amended, for the said housing project, including Exhibits required therein, shall be submitted to the Federal Housing Administration within forty-five (45) days from the effective date of this lease. * * * That the lessee shall lease all units of the housing project to such military and civilian personnel of the Army, Navy, Marine Corps or Air Force (including Government Contractors' employees) assigned to duty at the military installation or in the area where such property is located, as are designated by the Commanding Officer, OFFUTT AIR FORCE BASE, OMAHA, NEBRASKA: provided, however, that" under certain circumstances and conditions, the lessee might lease such unit or units to persons other than such military or civilian personnel if their leases were limited to a term of 1 year with provision for an automatic renewal thereafter from month to month.

Section 8 of the lease specifically provides: "That the Lessee shall pay to the proper authority, when and as the same become due and payable, all taxes, assessments, and similar charges which, at any time during the term of this lease, may be taxed, assessed or imposed upon the Government or upon the Lessee with respect to or upon the leased premises. In the event any taxes, assessments, or similar charges are imposed with the consent of the Congress of the United States *upon the property owned by the Government and included in this lease (as opposed to the leasehold interest of the Lessee therein), this lease shall be renegotiated* so as to accomplish an equitable reduction in the rental provided above, which shall not be greater than the difference between the amount of such taxes, assessments, or similar charges and the amount of any taxes, assessments or similar charges which were imposed upon such Lessee with respect to his leasehold interest in the leased premises prior to the granting of

BUSINESS 1952

Schedule No.

A. BUSINESS AND PROFESSIONAL SCHEDULE
(READ INSTRUCTIONS ON REVERSE SIDE CAREFULLY)

CORPORATION ☐ PARTNERSHIP ☐ INDIVIDUAL ☐

TRADE NAME OF BUSINESS: Offutt Housing Company
OWNER'S NAME: Offutt Housing Company
BUSINESS ADDRESS: 918 City National Bank.
PRECINCT OR TOWN: Bellevue CITY OR VILLAGE: 2nd
IF IN VILLAGE WRITE YES:
PART OF SECTION: SE1/4 NE1/4 SEC. NO.: 35 2 TWP.: 13 13 RNG.: 14 13

B. For Assessor's Use Only
Recap. No.
Road Dist. No.
School Dist. No.
Fire Dist. No.
Tax Dist. No.

C. Type of Business—(See Classification at right)

D. 1951 return made in: State Co. Precinct School Dist.

E. List below Motor Vehicles owned, used in Business

YEAR	MAKE	BODY TYPE	FACTORY RATED CAP.	LICENSED YES	LICENSED NO	LICENSE NO.
19						
19						
19						
19						
19						

F. FURNITURE & FIXTURES—TOOLS & EQUIPMENT

COLUMN ONE	No.	Actual Value
General		
1. Adding Machines-Calculators	1	50
2. Air Conditioning Units		
3. Bookkeeping Mach. & Inter. Comm. Sys.		
4. Cameras and Kodaks		
5. Cash Registers	1	15
6. Chairs and Tables	10	30
7. Counters and Show Cases		
8. Desks	2	40
9. Desk and Floor Lamps		
10. Display Units and Shelving		
11. Files	2	20
12. Ice Cream Mach., Coolers		
13. Music Boxes		
14. Neon Signs and Clocks		
15. Penny Weighing Mach.		
16. Pinball Mach., Shuffleboards		
17. Radios	1	15
18. Safes, Storage Cabinets		
19. Scales		
20. Signs and Sign Panels		
21. Television Sets		
22. Tools, All Kinds		
23. Typewriters and Mimeographs	1	35
24. Vending Machines		
Professional		
1. Barber Chairs and Tools		
2. Book Cases-Magazine Stands		
3. Burial Equipment		
4. Comptometers		
5. Davenports and Settees		
6. Dental Chairs and Tools		
7. Dictaphones and Teletypes		
8. Hair Dryers		
9. Hospital Beds		
10. Operating Tables		
11. Permanent Wave Machines		
12. Professional Libraries		
13. Sun Lamps-Sterilizers		
14. Surgical Instruments		
15. X-Ray Equipment		
16. Other Prof. Equipment		
Retail Stores		
1. Cutters and Slicers		
2. Refrigeration Units		
3. Refrigerated Show Cases		
4. Refrig. Lockers & Equipment		
5. Shopping Buggies		
Lodging, Refreshment, Recreation		
1. Back Bars and Mirrors		
2. Beverage Coolers		
3. Booths and Tables		
4. Bowling Alleys and Equip.		
5. Carpets, Rugs and Draperies		
Carry This Total Forward		205

COLUMN TWO	No.	Actual Value
BALANCE CARRIED FWD		205
6. Dishes-Silverware-Utensils		
7. Mixers-Toasters-Coffee Mkrs.		
8. Mot. Pic. Proj., Cameras, Seats		
9. Pool & Billiard Tables & Equip.		
10. Popcorn & Vending Machines		
11. Soda Fountain Equipment		
12. Theatre Screens, Sound Panels		
Petroleum Sales—Motor And Implement Service		
1. Air Compressors		
2. Brake Lining Mach. & Equip.		
3. Gasoline Pumps		
4. Hoists and Grease Racks		
5. Jacks		
6. Lubesters and Dispensers		
7. Lubrication Equipment		
8. Motors, All Kinds		
9. Parts Bins		
10. Tanks No. Cap.		
11. Valve Grinders and Lathes		
12. Vulcanizing and Tire Equip.		
13. Welding Equipment		
14. Wheel Alignment Equip.		
Wholesale-Industrial Construction, Etc.		
1. Bottle Washers		
2. Bottling Machines		
3. Bulldozers-LeTourneaus		
4. Canning Machines		
5. Can Washers-Cream Testers		
6. Cement Mixers		
7. Churns-Pasteurizers-Homogenizers		
8. Conveyors-Elevators		
9. Dehydrating Machines		
10. Diesel Motors		
11. Draglines-Graders		
12. Drills and Dies		
13. Grain Dryers		
14. Grinders, Milling Equip.		
15. Incubators-Brooders		
16. Land Rollers-Scoops		
17. Lowboys		
18. Machine Saws-Lathes		
19. Packers-Airhammers		
20. Plating Equip. Sanders		
21. Tractors		
Miscellaneous and Specialized		
1. Household Appliances	69695	
2.		
3.		
4.		
5.		
6.		
7.		
8.		
9.		

TOTAL VALUE COLUMNS ONE AND TWO F

G. INVENTORY COMPUTATION FROM BOOKS (Do Not Reduce by Any Percentage)

1. Actual Value of Inventory as of End of Fiscal Yr.
2. Goods Pur. From End of Fiscal Yr. to Mar. 10.
3. Total of Lines 1 & 2
4. Total Sales From End of Fiscal Yr. to Mar. 10
5. Less Gross Profit (____%) Amount
6. Net Cost of Goods Sold (Difference between 4 & 5)
7. Value of Inventory Mar. 10 (Difference Between 3 & 6)
8. Value of Motor Vehicles, Dealers Only (Form 6 Attached)
9. Value of Total Inventory Mar. 10 (Total of Lines 7 & 8) TOTAL SECTION G. G

H. EXCESS CAPITAL INVESTED BY GRAIN DEALERS, OIL DEALERS, MOTION PICTURE DISTRIBUTORS AND SUGAR MANUFACTURERS (Special Schedule Form 5 Attached) H

I. IMPROVEMENTS ON LEASED LAND I 17557.85

Grand Total Value Sections F, G, H and I (Carry to Proper Line at Right. Do not reduce by Any Percentage) 8256.85

J. CLASSIFIED BUSINESS

	No.	Actual Value	
72. Advertising Agencies			72
73. Airports			73
74. Alfalfa Mills			74
75. Apartment Houses		825685	75
76. Attorneys			76
77. Bakeries			77
78. Barber & Beauty Shops			78
79. Book & Magazine Stores			79
80. Bowling Alleys			80
81. Broadcasting Stations			81
82. Cabin Camps & Motels			82
83. Cafes & Confectioneries			83
84. Carpenters & Contractors			84
85. Cleaners & Laundries			85
86. Clothing&DryGoodsStores			86
87. Coin Machine Operators			87
88. Cold Strge & Locker Plants			88
89. Creameries & Dairies			89
90. Dentists & Physicians			90
91. Department Stores			91
92. Drug Stores			92
93. Earth Movers			93
94. Florists & Greenhouses			94
95. Funeral Homes			95
96. Furniture Stores			96
97. Garages,Tire&Rep'rShops			97
98. Grain Dealers			98
99. Grocery & Meat Mkts.			99
100. Hardware&Appl'ceStores			100
101. Hatcheries			101
102. Hospitals			102
103. Hotels & Rooming House			103
104. Implement Dealers			104
105. Jewelry Stores			105
106. Liquor Stores			106
107. Lumber & Coal Dealers			107
108. Machine Shops			108
109. Manufacturers			109
110. Motion Picture Dist'rs.			110
111. Motor Vehicle Dealers			111
112. Nurseries			112
113. Offices, Real Est., Ins., etc.			113
114. Oil Dealers Retail			114
115. Oil Distributors			115
116. Optometrists			116
117. Packing & Process'g Plants			117
118. Photography Shops			118
119. Plmbg.&ElectricalContr's			119
120. Pool Halls & Taverns			120
121. Post Office Fixtures			121
122. Printing & Binding Plants			122
123. Produce Stations			123
124. Radio Shops			124
125. Shoe Repair Shops			125
126. Shoe Stores			126
127. Sugar Mfgrs.			127
128. Theatres			128
129. Variety Stores			129
130. Veterinarians			130
131. Well Drillers			131
132. Wholesalers & Dis'butors			132
133. Miscellaneous Business: (Specify)			133
134. 50% Penalty,F'lure to List			134
135. TOTAL TANGIBLE		825685	135★

K. INTANGIBLE PROPERTY CLASS "A"

1 Money on Hand, in Banks Checking and Savings Accounts		1
2 Postal Savings		2
3 Checks, Drafts or Bills of Exch.		3
TOTAL CLASS "A"		A

L. INTANGIBLE PROPERTY—CLASS "B"

4. Shares of stock in corporations, the capital stock of which is not assessed or taxed in this state. (List names on back hereof.)		4
5. Stock or shares of building and loan associations (Total amount ($_____) ten per cent of which is		5
6. Securities, debentures and bonds, (except those of the United States, this State, or any political subdivision thereof)		6
7. Notes, secured or unsecured, (except notes secured by mortgages on real estate situated in Nebraska)		7
8. Due bills, annuities, royalties and all sums of money receivable at stated periods		8
9. Book acc'ts or open acc'ts, judgments, other claims and demands for money or other valuable consideration or things not named		9
10. Value of capital stock, Nebraska & domesticated corporations (Special Schedule Form 4 attached)		10
.80 per $100.00 TOTAL CLASS "B"		B
TOTAL INTANGIBLE TAX		

M. OATH

STATE OF NEBRASKA } ss
COUNTY OF Sarpy

I, the undersigned, being duly sworn, say that the foregoing statement and schedule is true and contains a full and complete list of all property held by or belonging to me on March 10. Such property has been fully and fairly described and its true condition represented, and I have in no case sought to misrepresent the quantity or quality of the property. I further swear that my answers to the following interrogatories are true, so help me God.

Signed

By

Subscribed in my presence, and sworn to before me this 23 day of June 1952. Earnest Nielsen

Returned and corrected	By Co. Assessor	By Co. Board	By State Board
Tangible Totals			
Class A Totals			
Class B Totals			

THIS SCHEDULE WILL NOT BE ACCEPTED UNTIL OATH IS SIGNED AND ALL INTERROGATORIES ARE ANSWERED ON BACK HEREON.

Form 2—Authorized by State Tax Commissioner • This schedule MUST be made out by the property owner and SIGNED in ink or indelible pencil after schedule is filled out. Return to JOE C. STOLINSKI, County Assessor Douglas County, Omaha, Nebr. When completed and sworn to it must be made out by the property owner and SIGNED in ink or indelible pencil after schedule is filled out. Return to JOE C. STOLINSKI, County Assessor Douglas County, Omaha, Nebr.

OMAHA PRINTING COMPANY

Exhibit 5—Assessment Schedule 1952. A. 3

SHARES OF STOCK IN CORPORATIONS—Capital Stock of Which is Not Assessed or Taxed in This State			
NAME OF CORPORATION	Number of Shares	Value Per Share	Total Value (List Dollars Only)

Have you made a Business and Professional Schedule other than this one in 1952?

Answer ___ If answer is yes, state where

INTERROGATORIES

77-1231 of the revenue law provides that the person required to list intangible and tangible property shall answer in writing, over his signature and under oath, the following interrogatories:

Interrogatory 1: Are you, or were you, on March 10 of the present year, the excutor of the last will, or the administrator of the estate of any deceased person, or the guardian of the estate of any infant or person of unsound mind, or the trustee of the property of any person, or the receiver of any corporation, association or firm, or the agent, attorney or banker investing, loaning or otherwise controlling the money or the property of any person or the president or accounting officer of any corporation, or a partner, consignee, or pawnbroker? If yes, designate for whom you were then, or now are, acting in such representative or fiduciary capacity; and if you were then, or now are, acting under the authority of any particular court, name the court, and also state to what court you report.

Answer.....

Interrogatory 2: Have you, since March 10 of last year, either personally or through the agency of others, caused all or any part of your taxable property or other property to be temporarily converted, either by sale, loan, exchange or in any other manner, into bonds or other securities of the United States not taxable, or any other property not taxable, with the intention to pay back, return, exchange or dispose of such property after you have made out your tax statement? Or did you on or before March 10 of the present year, and before you saw this interrogatory, pay back, return, exchange or dispose of any such property for the purpose aforesaid?

Answer.....

Interrogatory 3: If you have converted any of your money or property, or money or property of any other person, as inquired of you, then state when the same was so converted or invested, and the time and amount of value therof.

Answer.....

Interrogatory 4: Have you, at any time since March 10 in the preceding year, withdrawn from any bank any money deposited therein for the purpose of converting the same into some form of nontaxable property, or for the purpose of sending the same out of the state, or transferring the same to some other person or persons, with the intent or purpose of evading the payment of tax on the same?

Answer.....

or any such property for the purpose aforesaid?

Answer.....

Interrogatory 3: If you have converted any of your money or property, or money or property of any other person, as inquired of you, then state when the same was so converted or invested, and the time and amount of value therof.

Answer.....

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Answer.....

GENERAL INSTRUCTIONS

1. According to the provisions of Section 77-1229, R.R.S. Nebr. 1943, you are required to make out a true statement, list or schedule of all intangible and tangible personal property subject to taxation which is held by you as owner, lessee or occupant in control thereof, or as guardian, husband, parent, trustee, executor, administrator, receiver, accounting officer, partner, agent or other representative officer. You are further required to verify said statement, list or schedule under oath before the county assessor, his assistants, a notary public or some other person authorized by law to take acknowledgments and return same to the county assessor or his assistants on or before April 20th. The law states the word "None" must be written opposite each item where no property of that kind is owned. Return intangible and tangible personal property of wife and children on this schedule unless separate schedules are filed.

2. While property is listed for taxation as of March 10, nevertheless Section 77-1211, R.R.S. Nebr. 1943, provides for the listing of property brought into the State or county after the tenth day of March and prior to the first day of July.

3. Section 77-412, R.R.S. Nebr. 1943, empowers the county assessor to add to the return of any taxpayer items of property he may find have been omitted and to change the valuation of any item of property in the return to what he deems to be its actual value. Notice of such change shall be given to the taxpayer or his agent by postcard to the address of the taxpayer shown on the return.

4. Section 77-413, R.R.S. Nebr. 1943, provides that any personal property either tangible or intangible which was not returned for taxation for any or all of the three previous years shall be taxed at the rate of levies for the year in which such property was omitted, and there shall be added interest at the rate of 7 percent plus a penalty of 10 percent of the tax on tangible property and 50 percent of the tax on intangible property.

5. The County Board of Equalization, which is composed of the County Board, the County Assessor, and the County Clerk, meets on the first Monday in May and continues in session not more than fifty days, or less than three days.

6. If you are doing business as a corporation organized under the laws of Nebraska, this schedule must be accompanied by the Nebraska Corporation Schedule, Form 4, properly filled out.

SPECIAL INSTRUCTIONS FOR COMPUTING THE BUSINESS AND PROFESSIONAL SCHEDULE

The Business and Professional Schedule is made up of 13 parts lettered "A" to "M" inclusive. Contents of each section should be carefully considered and accurately completed.

A. Enter the full name of the owner together with the trade name of the business and the information requested as to its location. Indicate whether the business is organized as a corporation, partnership or individual proprietorship. If a corporation or partnership, owner's name and trade name may be identical. In such case, list in both spaces provided. All corporations will complete the supplemental Corporation Schedule, Form 4, and attach the same to this report.

B. The assessor or his assistant will complete this section.

C. State correctly type of business you are in, such as "Grocery Store," "Department Store," etc. Your business should conform to one or more of the classifications listed in Section J. If none of the businesses enumerated in Section J properly

by the Nebraska Corporation Schedule, Form 4, properly filled out.

SPECIAL INSTRUCTIONS FOR COMPUTING THE BUSINESS AND PROFESSIONAL SCHEDULE

The Business and Professional Schedule is made up of 13 parts lettered "A" to "M" inclusive. Contents of each section should be carefully considered and accurately completed.

A. Enter the full name of the owner together with the trade name of the business and the information requested as to its location. Indicate whether the business is organized as a corporation, partnership or individual proprietorship. If a corporation or partnership, owner's name and trade name may be identical. In such case, list in both spaces provided. All corporations will complete the supplemental Corporation Schedule, Form 4, and attach the same to this report.

B. The assessor or his assistant will complete this section.

C. State correctly type of business you are in, such as "Grocery Store," "Department Store," etc. Your business should conform to one or more of the classifications listed in Section J. If none of the businesses enumerated in Section J properly describe your enterprise, you may substitute your own description in the space provided.

D. Answer the questions in Section D correctly, especially if you have moved since making your last return, as it will facilitate assessing your motor vehicles in the correct taxing district.

E. List all motor vehicles used in the business, whether licensed or not; include trailers.

F. List items of furniture and equipment in this section. All business establishments will have some items in the first or general group. After completing the listings in this group, choose from the remaining groups the one that most nearly fits the particular type of business and list the remaining items of Furniture and Equipment. Items not listed on the schedule, should be written on the blank lines under the heading "Miscellaneous and Specialized."

G. This section contains the formula for computing the value of merchandise on hand March 10, and Section G must be filled out completely and the final value entered on line 9 thereof.

H. Grain dealers, oil distributors, motion picture distributors and sugar manufacturers will complete the Special Schedule, Form 5, in accordance with instructions thereon, and carry the value of excess capital invested to line H.

I. Here you will enter the value of all improvements owned by the business which are not assessed and taxed as real estate.

J. The grand total of Sections F, G, H and I, will be carried to the right and entered opposite the classification corresponding to that shown in Section C. If you are the custodian of any property not owned by your business, or if you have merchandise on consignment owned by others, you must make another schedule for that property and sign the same as agent for the respective concern.

K. You are held responsible for filling this part of the schedule truthfully. This type of property is subject only to an intangible tax of 25c on every one hundred dollars' valuation.

L. Furnish this information as requested.

M. Look your schedule over carefully before signing. Bear in mind that you are swearing under oath to its accuracy and that penalties in addition to those outlined in paragraph 4 of the General Instructions can be levied if a fraudulent return is made. See Sections 77-1232, R.R.S. Nebr. 1943 and 77-1233, R.R.S. Nebr. 1943.

SPECIAL NOTICE: Special supplementary schedules must be completed by the following types of business and the same attached to this schedule before returning to the County Assessor:

1. Corporations organized under the laws of the State of Nebraska; 2. Motor vehicle dealers; 3. Grain dealers, oil distributors, motion picture distributors and sugar manufacturers.

If you are one of the above and do not have a special schedule along with this schedule, request one from your County Assessor at once.

such consent by the Congress of the United States * * *." (Italics supplied.)

Plaintiff was required to comply with all applicable laws; to keep the buildings and improvements in good order, condition, and repair, and save the government harmless from failure in that respect; to keep them insured against fire in an amount determinable by the government but at its own expense, with loss payable to lessee and any security holder jointly as their interest may appear; and in the event of any partial loss or damage to the improvements, lessee was required within a reasonable time to restore them to their former condition. Plaintiff also had the right to permit utility companies to extend water, sewer, gas, telephone, and electric power lines on the premises for the exclusive purpose of furnishing utilities to the housing project.

Thereafter, on February 1, 1951, plaintiff, as mortgagor, mortgaged its "described leasehold situated in the ..... of ....., County of Sarpy, and State of Nebraska, to-wit: all right, title, interest and privileges of the mortgagor in and to that certain ground Lease between the SECRETARY OF THE AIR FORCE representing the UNITED STATES OF AMERICA, and Mortgagor, dated January 18, 1951 * * * Together with the privileges and appurtenances to the same belonging, and all of the rents, issues, and profits which may arise or be had therefrom; and * * * all buildings and improvements of every kind and description now or hereafter erected, or placed thereon," including all fixtures of every described kind "together with all building materials and equipment now or hereafter delivered to said premises and intended to be installed therein" and "All articles of personal property owned by the Mortgagor and now or hereafter attached to or used in and about the building or buildings now erected or here-

after to be erected on the lands herein described" all of which property was deemed fixtures to the extent permitted by law. The mortgagee was Manufacturers Trust Company of New York. The principal of the mortgage was $4,949,100, with interest at 4 percent per annum, upon the unpaid balance until paid by monthly installments of $22,683.37, all according to the terms of a promissory note of even date. In addition thereto, plaintiff agreed to pay monthly to the mortgagee a sum sufficient to prevent delinquency of premium charges under the contract of mortgage insurance with the Federal Housing Commissioner, together with ground rentals, tax assessments, water rents, fire and other hazard insurance premiums. Plaintiff also agreed to pay all taxes levied on the mortgagee's interest in the improvements and upon the mortgage or debt secured thereby, excluding any income tax, state or federal, imposed on the mortgagee.

Plaintiff was required to keep the improvements and equipment then existing or therafter erected, insured against loss by fire or other hazard, in an amount equal to not less than 80 percent of the actual cash value thereof, with loss payable to mortgagee and the Federal Housing Commissioner as their interests may appear. The mortgage also provided that any amount paid for loss should, to the extent of indebtedness unpaid, be paid to the mortgagee and at its option such may be applied on the debt or released for repairing or rebuilding the premises.

Plaintiff further agreed to commit or suffer no waste of the property and keep same in good condition and repair, and in all respects conform to and comply with the covenants, provisions, terms, condition, and agreements of the valid ground lease executed January 18, 1951, then in full force and effect. Many other provisions, terms, and conditions upon which the right of forfeiture or default

might depend appear in the mortgage, but they are of no importance here. The mortgage was duly insured by the Federal Housing Administration, and the 611 modern housing units, equipped as covered by the mortgage, were constructed, with 78 percent of them completed by March 10, 1952, and all of them by about June 6, 1952. Concededly, the buildings and improvements have a useful life expectancy of only about 35 years.

On April 11, 1952, the Attorney General of this state rendered an opinion that plaintiff's interest in the project, including all of the personal property used therein, was taxable as personal property. Report of Attorney General, 1951-1952, p. 486. Nevertheless, plaintiff filed no tax return, and on June 23, 1952, the county assessor of Sarpy County prepared and filed a "Business 1952 Schedule," for plaintiff corporation in which he listed "Furniture & Fixtures—Tools & Equipment $205 * * * Household Appliances $69,695 * * * Improvements on Leased Land $755,785." The total was listed as "Apartment Houses $825,685." The property is not located in any municipality or school district, thus there was a state and county tax levy and assessment of $10,783.45, no part of which tax was ever paid by plaintiff after due notice thereof.

In that connection, section 4 of the Enabling Act provides in part: "* * * that no taxes shall be imposed by said state on lands or property therein belonging to or which may hereafter be purchased by the United States." Volume 2, R. R. S. 1943, p. 7. Section 72-601, R. R. S. 1943, provides in part: "The consent of the State of Nebraska is granted to the United States of America * * * for the purchase by the United States of such other lands within the State of Nebraska as the agents or authorities of the United States may from time to time select for the erection of forts, magazines, arsenals and other needful buildings." Section 72-602, R. R. S. 1943, provides: "The

jurisdiction of the State of Nebraska in and over the lands mentioned in section 72-601 shall be ceded to the United States; Provided, the jurisdiction ceded shall continue no longer than the United States shall own or occupy such lands." Section 72-604, R. R. S. 1943, provides: "The jurisdiction ceded shall not vest until the United States shall have acquired the title to such lands by purchase or grant. So long as the lands shall remain the property of the United States, when acquired as provided in section 72-601, and no longer, they shall be exempt from all taxes, assessments, and other charges which may be levied or imposed under the authority of the laws of this state."

Article I, section 8, Constitution of the United States, gives Congress exclusive legislative authority over all such places purchased by consent of the Legislature of the state, and gives it authority "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Thus, if Congress by its legislative acts heretofore set forth consented to the occupation of its lands by lessee and the taxation of lessee's interest in the project erected thereon, then, in that respect, any immunity or exemption thereof from taxation appearing in the Enabling Act and ceding statutes of this state was waived. In other words, the right to tax lessee's interest in the housing project located on the air base was re-ceded to the State of Nebraska. *Board of County Commissioners* v. *United States*, 105 F. Supp. 995. Such case is also comparable in principle with that at bar and supports the right to tax plaintiff's interest here involved.

Article VIII, section 1, Constitution of Nebraska, provides in part: "The necessary revenue of the state and

its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct; but taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, and taxes uniform as to class may be levied by valuation upon all other property." Section 2 provides in part: "The property of the state and its governmental subdivisions shall be exempt from taxation. * * * No property shall be exempt from taxation except as provided in this section." In that connection, plaintiff's interest here involved is not constitutionally exempt from taxation.

Further, our revenue and taxation statutes are controlling. Section 77-102, R. R. S. 1943, provides: "The word 'property' includes every kind of property, tangible or intangible, subject to ownership." Section 77-104, R. R. S. 1943, provides: "The term 'personal property' includes all property other than real property and franchises." Section 77-201, R. R. S. 1943, provides: "All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value." (Such statute was amended, effective March 6, 1953, to provide that all such property should be valued at its actual value, but shall be assessed at fifty percent of its actual value.) Section 77-1201, R. R. S. 1943, provides in part: "A complete list of all personal property held or owned on March 10 of the year in which the assessment is being made, except motor vehicles, shall be made as follows: (1) Every person of full age and sound mind, being a resident of this state, shall list * * * all other personal property * * *." Section 77-1229, R. R. S. 1943, provides: "Every person required to list property shall make out and verify by his oath a statement of all personal property which he is required to list, either as owner, lessee or occupant in control thereof * * * upon the blanks pre-

scribed by the State Tax Commissioner. Such blanks shall be delivered to each taxpayer by the county assessor or his assistants for that purpose, and when so made out shall be verified by each person before the county assessor, his assistants, a notary public, or some other person authorized by law to take acknowledgments, and be delivered to the county assessor or county clerk as ex efficio county assessor on or before April 20 of each year."

This court in *Ashby* v. *Peters*, 124 Neb. 131, 245 N. W. 408, next reported 128 Neb. 338, 258 N. W. 639, 99 A. L. R. 843, held that: "Save for the purposes of conveyancing, a lease of more than one year is not real estate." See, also *Paul v. Cameron*, 127 Neb. 510, 256 N. W. 11. Generally, a leasehold for a term of years is a chattel real, falling within the classification of personal property. 51 C. J. S., Landlord and Tenant, s. 26, p. 531. For all practical purposes, it may be the equivalent of absolute ownership. 51 C. J. S., Landlord and Tenant, s. 202, p. 809. In that connection, section 77-1209, R. R. S. 1943, specifically applicable here, provides: "All improvements put on leased public lands shall be assessed to the owner of such improvements as personal property, together with the value of the lease, and listed and assessed as such in the place where the land is situated. The taxes imposed on such improvements shall be collected by levy and sale of the interest of such owner, the same as in all other cases of collection of taxes on personal property, or by suit in the name of the county against such owner."

For taxation purposes, what is meant by public lands, as used in section 77-1209, R. R. S. 1943? In *Union Pacific Ry. Co.* v. *Karges*, 169 F. 459, quoting from *Northern Lumber Co.* v. *O'Brien*, 139 F. 614, 71 C. C. A. 598, it is said: "'The words "public land" have long had a settled meaning in the legislation of Congress, and, when a different in-

tention is not clearly expressed, are used to designate such land as is subject to sale or other disposal under general laws, but not such as is reserved by competent authority for any purpose or in any manner, although no exception of it is made. (Numerous cases cited.)' '' However, thereafter the court said: ''These decisions do not conflict with the settled doctrine that, where it clearly appears from the statute that the term 'public lands' is intended to include lands which have theretofore been reserved by Congress for a specific purpose, such intention will prevail, as it is a fundamental rule of construction that a legislative act is to be interpreted according to the plain intention of the legislative body.'' See, also, *Dugan* v. *Montoya,* 24 N. M. 102, 173 P. 118; *United States* v. *Bisel,* 8 Mont. 20, 19 P. 251; *United States* v. *Blendaur,* 128 F. 910.

Cotulla v. *Laxson,* 60 Tex. 443, involved a penal statute which made it an offense for any person who was an officer or clerk in the general land office, or a county surveyor or his deputy, to directly or indirectly be concerned in the purchase of any right, title, or interest in any public lands. In that opinion it is said: ''That the term 'public land,' as used in that article, is not limited in its signification to unappropriated public domain, but also includes what is usually designated as public school lands, it seems to us admits of no question. These public school lands were set apart for a public purpose, devoted to the promotion of public education. The act of appropriation, or, rather, the dedication of these lands to that purpose, did not work a change in their ownership; true they were not thereafter unappropriated public domain, but as ever belonged to the public.''

In *Deshazo* v. *Eubank,* (Tex. Com. App.), 222 S. W. 976, involving a comparable situation, it is said, referring to public lands: ''The sense in which the term is used may vary

somewhat in the different statutes, and it should be given such meaning as will effectuate the intention of the Legislature in its use." The opinion thereafter cited and quoted with approval from *Cotulla* v. *Laxson, supra.*

As stated in 73 C. J. S., Public Lands, s. 1, p. 647; "The meaning of the words 'public lands,' may vary somewhat, however, in different statutes passed for different purposes, and they should be given such meaning in each as comports with the intention of the legislature in their use." See, also, *State ex rel. Sioux County* v. *Tucker,* 38 Neb. 56, 56 N. W. 718.

We believe our Legislature intended that the term "leased public lands" as used in section 77-1209, R. R. S. 1943, for taxation purposes, should and does mean "lands belonging to the public, which have been leased as authorized by law."

Plaintiff's lease provided that upon its expiration or earlier termination, all improvements made upon the leased premises should, with exceptions unimportant here, remain the property of the government without compensation. It also provided that the buildings and improvements erected by the lessee constituting the housing project should be and become as completed real estate and part of the leased land and public buildings of the United States, leased to lessee for the purpose of serving the governmental and public purpose of military housing in accordance with Title VIII of the National Housing Act, and in accordance with the provisions of the lease and subject to the term of the lease and any renewal or extension of the same. As we view it, the first sentence aforesaid simply provided when and in what manner plaintiff's interest would ultimately become the government's property, while the second sentence simply prevented plaintiff from destroying the mortgage security insured by the government and from

defeating the purpose of the housing project by removing any of the buildings or improvements from the leased land and assured plaintiff's performance of the terms and conditions of the mortgage and lease. The language used therein did serve to retain the bare legal title in the government for a nominal consideration of $100 per year, but it did not in any manner deprive plaintiff of the ownership of its interest as lessee, which for all intents and purposes was the actual value of all the buildings and improvements, together with the fixtures thereof and all personal property used therein on the leased land so long as its lease was in force and effect. In *Ken Realty Co.* v. *Johnson,* 138 F. 2d 809, it is pointed out that: "But when a separate interest in a piece of property is exempt, or its owner is immune from taxation, the several separate interests must be recognized" for tax purposes.

In that regard, plaintiff's lease was for a period of 75 years, which was 5 years longer than 3 score and 10, the convential life of ordinary man. It was for a period so long that plaintiff would have dominion or control and could profitably use and consume the entire useful life of two complete generations of housing units, each having a useful expectancy of 35 years, with 5 years still remaining for unexpected longevity. Also, in conformity with federal laws, plaintiff mortgaged its interest as owner thereof for $4,949,100, the estimated replacement cost of which was $5,449,490, and the Federal Housing Commissioner duly insured the mortgage. In addition, plaintiff corporation entered into and filed conditional sales contracts and chattel mortgages covering furniture, appliances, and equipment used in the housing project, the consideration for which totalled $110,933.97. Further, on July 28, 1953, Carl C. Wilson, both as president of plaintiff corporation and as president of Carl C. Wilson, Inc., duly signed and acknowledged the execution of a limited assignment of Offutt hous-

ing project rentals to the Douglas County Bank of Omaha for the business purposes and advantage of both corporations. Therein it was represented in part that Offutt Housing Corporation was the owner of 611 housing units located at Offutt Field, Sarpy County, Nebraska. As a witness in this case, Carl C. Wilson also conceded that the improvements had only a life expectancy of about 35 years, "that any building that was seventy-five years old was not worth maintaining any farther than that," and that plaintiff was entitled to the possession and use together with all income and profits therefrom, for 75 years at a rental of only $100 a year.

We therefore conclude that for purposes of taxation under the provisions of section 77-1209, R. R. S. 1943, plaintiff was in fact and as a matter of law the owner of all the improvements, including the fixtures, appliances, equipment, furniture, and other personal property used therein, so long as his lease was in force and effect, all of which was taxable as personal property. To conclude otherwise would permit plaintiff to perpetrate a sham and fraud upon the state and its governmental subdivisions.

The following authorities support the foregoing conclusions. *Baltimore Shipbuilding & Dry Dock Co.* v. *Mayor of Baltimore,* 97 Md. 97, 54 A. 623, affirmed in 195 U. S. 375, 25 S. Ct. 50, 49 L. Ed. 242, quoted with approval from *North Pacific R. R. Co.* v. *Patterson,* 154 U. S. 130, 14 S. Ct. 977, 38 L. Ed. 934, and *Wisconsin R. R. Co.* v. *Price County,* 133 U. S. 496, 10 S. Ct. 341, 33 L. Ed. 687, wherein it is said: " 'that he who has the right to property, and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of State taxation.' "

The opinion in *Meade Heights* v. *Tax Commission of Maryland, supra,* disposed of five cases involving the same

taxation principles, wherein three private corporations had leased from the United States five separate parcels of land located upon military reservations over which the federal government had exclusive jurisdiction. They severally constructed housing units thereon under authority of the federal housing statutes heretofore cited and discussed. The corporations had appealed from a tax assessment upon their interest in the buildings at full value thereof, and the court affirmed. The situation in such cases was in all material respects identical with that at bar except the particular applicable state statutes and two provisions of the lease, which could not change the ultimate result herein. In that regard, the lease of Meade Heights, Inc., was of 28½ acres at Fort Meade for 75 years, at a ground rental of $720 per annum, with a provision that title to all improvements erected should remain in lessee with a right of removal at termination, if it so elected. If it did not so elect, they would become property of the government, without compensation to lessee. In that opinion, it is said: "Coming to the main point, it is perfectly clear that, in the absence of congressional consent, express or implied, a State cannot impose a direct tax upon property owned by the federal government or held for it. (Citing cases.) But it is equally clear that private interests in government property are taxable to their full value. (Citing cases.) In the instant case, Congress has definitely consented to the taxation of the lessee's interest, whatever that may be. It can only complain if, in fact, its reserved interest is subject to taxation. * * * The assessment before us is against the lessee, and purports to reach the full value of the buildings in its hands. The government cannot complain if the tax, otherwise sustainable, increases government costs by its economic incidence. *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 58 S. Ct. 208, 82 L. Ed. 155; *Alabama* v. *King & Boozer*, 314 U. S. 1, 62 S. Ct. 43, 86 L. Ed. 3."

Gay v. *Jemison* (Fla.) 52, So. 2d 137, also involved the same taxation principles, but from a somewhat different statutory angle. In such case, the comptroller appealed from a decree in favor of plaintiff enjoining the collection of taxes on materials to be used in construction of 450 housing units on similar land leased by a private corporation from the United States. As hereinafter observed, the lease was in all material respects identical with that here involved. The court in that opinion dismissed plaintiff's bill of complaint, saying: "Comparing the probable useful life of the buildings with the time for which the lease is to extend, the question immediately arises in one's mind whether the useful life of the buildings will not have ended by the time the lease expires. We have already said also that the buildings are for the 'primary' use of military personnel. It may be assumed that this is the chief purpose of the installation; however, the lease contains the statement that the property may be occupied by civilian as well as military personnel of the army, marine corps, and air force; and, further, that upon failure of the commanding officer of the field to designate persons of those classifications to tenant any units within a certain length of time after they become vacant, the lessee may then rent to parties who do not fall in any of these categories.

"It is an obligation of the lessee to comply with all ordinances with reference to licenses and permits to do business and it is its privilege to engage public utility companies to provide water, fuel, telephone service, and electric power for the use of the occupants of the units. The lessee is bound to maintain the property in a state of good repair and to save the government harmless against all actions and suits springing from any failure in this respect.

"The lessee is required at its own cost to insure the buildings and to restore any of them damaged by fire, but

if a building is wholly destroyed, then the lessee has the right to determine that the building shall not be reproduced.

"The lessee must pay 'all taxes, assessments, and similar charges which, at any time during the term of (the) lease, may be taxed, assessed or imposed upon the Government or upon the Lessee with respect to or upon the leased premises.'

"The bare title of the property, of course, remains in the United States Government, and for its use the government receives but $100 a year.

"Bearing in mind what we consider the evident intent of the Congress of the United States, and construing the language of the contract between the Government of the United States and the lessee, we cannot arrive at the chancellor's conclusion that this housing project when completed will be a public work owned by the United States Government.

"It is true that the government, through its military, retains a certain supervision over the area where the project is located and has a preference with reference to accommodations for its personnel, but taken as a whole, the arrangement is in reality one affording a source of income to the lessee, and we think it is obvious that any money withheld from the state by applying the exemption would not benefit the national exchequer but would reach the pockets of private citizens. The corporation borrows the money, takes the risks, bears the cost of maintenance and insurance, receives the income from rentals, and in case of total destruction of a building by fire, keeps, if it chooses, the money paid by the insurance company to cover the loss. The corporation must pay the debt it incurs to finance the installation, and certainly any profit for a period of seventy-five years belongs to it. Meanwhile as

a part of its expenses there is the nominal payment of $100 a year to the government as lessor.

"We believe the Comptroller's position is correct and that the materials furnished by the contractor will not become a part of a government work but of buildings of a private enterprise, and therefore are subject to state tax."

Tampa Bay Garden Apartments v. *Gay* (Fla.). 55 So. 2d 739, also involved the same taxation principles from a somewhat different statutory angle. In such case the private corporation appealed from a decree dismissing its bill of complaint and requiring it to secure a certificate of registration and collect a 3 percent sales tax from occupants of the housing units. In the opinion, after citing *Gay* v. *Jemison, supra,* with approval, the court affirmed the judgment, saying: "We find nothing in these cases or in the language of the pertinent legislative acts that show any purpose whatever to release the jurisdiction of the State over the lands in question so as to prohibit it from imposing the required three per cent sales tax on the housing project."

Davis v. *Howard,* 306 Ky. 149, 206 S. W. 2d 467, also involved the same taxation principles from a somewhat different statutory angle. In the opinion it was said: "Undoubtedly, it was the purpose of the Congress to recede to the state sufficient sovereignty over Federal areas within its territorial limits to enable it to levy and collect taxes named in the Act. Otherwise the Act was a futile gesture." See, also, *Kiker* v. *Philadelphia,* 346 Pa. 624, 31 A. 2d 289, certiorari denied 320 U. S. 741, 64 S. Ct. 41, 88 L. Ed. 439; *Bowers* v. *Oklahoma Tax Commission,* 51 F. Supp. 652.

For reasons heretofore stated, we conclude that plaintiff's interest in the housing units and fixtures as owner

D.

OPINION OF THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY, VIRGINIA, IN THOMASON PARK, INCORPORATED v. COUNTY OF PRINCE WILLIAM, VIRGINIA.

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY, VIRGINIA.

THOMASON PARK, INCORPORATED,
vs.
COUNTY OF PRINCE WILLIAM, VIRGINIA.

The plaintiff, a domestic corporation, hereinafter referred to as the "applicant," has petitioned this court for the recovery of certain taxes paid by it under protest to the County of Prince William Virginia, alleging that it was erroneously assessed with real estate taxes for the years 1952 and 1953 by the Commissioner of the Revenue of said county.

From the stipulated facts and the evidence heard *ore tenus* it appears that in the year 1950 the applicant leased three certain parcels of land situate near Triangle, Prince William County, Virginia, from the United States of America, under an agreement of lease which was entered into by virtue of the authority conferred upon the Secretary of the Navy by Act of Congress of August 5, 1947, and amendments thereto (61 Stat. 774; 34 U. S. C. A. 522a-522e). These parcels of land were leased by the applicant (formerly Marineland Park, Incorporated) for the purpose of the construction, operation and maintenance by it of a housing project on the leased premises. The land upon

which the improvements have been constructed and erected constitutes a part of the United States Marine Corps Reservation, known as Marine Corps Schools, Quantico, Virginia, over which the Federal Government exercises exclusive jurisdiction.

The applicant has been assessed with real estate taxes on such improvements in the amount of $2,500.00 and $11,925.00 for the tax years 1952 and 1953, respectively. It contends that it owns no interest in real estate in Prince William County taxable as such by the county; that the county cannot tax property of the United States by means of an assessment against a lessee of the United States and that property located upon lands over which the United States has exclusive jurisdiction is exempt from taxation by the county.

The Commissioner of the Revenue, who was examined as a witness, testified that in assessing the improvements on the land to the applicant he placed thereon the same valuation that he would have if the land were owned in fee simple by the applicant. He also testified that he made no assessment against the land itself as he did not consider it as being owned by the applicant and that he made no assessment against the applicant with respect to its leasehold interest in the land.

The lease itself, for which the applicant pays to the United States the sum of $1.00 for the entire term thereof, contains twenty-six numbered paragraphs but it would seem necessary to refer to but few of the many terms and conditions. The duration is for a period of seventy-five years but with the right reserved to the United States to terminate the same at the expiration of thirty-nine years under stated conditions. Also, unless certain conditions otherwise prevail, all housing units shall be rented to such personnel, military and civilian, of the Army,

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Navy, Marine Corps and Air Force as may be designated by the Commandant, Marine Corps Schools, Quantico, Virginia. The eighth paragraph of the lease provides in pertinent part the following:

> "8. That the lessee shall pay to the proper authority, when and as the same shall become due and payable, all taxes, assessments, and similar charges which, at any time during the term of this lease, may be taxed, assessed or imposed upon the government or upon the lessee with respect to or upon the leased property. In the event any taxes, assessments or similar charges are imposed with the consent of the Congress of the United States upon the property owned by the Government and included in this lease (as opposed to the leasehold interest of the lessee therein) this lease shall be renegotiated so as to accomplish an equitable reduction in the rental provided above, which shall not be greater than the difference between the amount of such taxes, assessments or similar charges and the amount of any taxes, assessments or similar charges which were imposed upon such lessee with respect to his leasehold interest in the leased property prior to the granting of such consent by the Congress of the United States; * * *".

The paragraph in the lease above referred to was obviously inserted pursuant to the mandate of the Act of Congress of August 5, 1947 (61 Stat. 775; 34 U.S.C.A. 522e) for the following is provided for:

> "522e. The lessee's interest, made or created pursuant to the provisions of sections 522a-522c and 522e of this title, shall be made subject to state or local taxation. Any lease of property authorized under the provisions of said sections shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated."

The following provision is found as Paragraph eleven of the lease:

> "11. That upon the expiration of this lease, or earlier termination, all improvements made upon the leased premises and all ranges, refrigerators, screens, shades and other items required to be furnished with the improvements in accordance with the plans and specifications submitted by the lessee, and approved by the Federal Housing Commissioner, shall remain on the leased premises and be the property of the Government without compensation; Provided, however, that where the lessee replaces any such items, this Condition 11 shall apply only to the replacement."

The decision of the Commissioner of the Revenue of Prince William County to exempt from assessment the land upon which the improvements have been constructed was eminently correct for the land was acquired by the United States with the consent of the Commonwealth of Virginia in the year 1918 as authorized by the seventeenth section of the eighth clause of the first article of the Constitution of the United States; the consent of the Commonwealth being found in the form of an act of cession as Chapter 382 of the Acts of Assembly of 1918, approved March 16, 1918. The third paragraph of the act provides that:

> "3. The jurisdiction ceded shall not vest until the United States shall have acquired the title to, or possession of the said lands, or rights, or interest therein by purchase, condemnation, lease, or otherwise; and so long as the said lands, or any rights, or interest therein are held in fee simple by the United States, and no longer, such rights, or interest, as the case may be, shall continue exempt and exonerated, from all State, county and municipal taxation, assessment or other charges, which may be levied or imposed under the authority of this State."

By this act of cession the Commonwealth of Virginia relinquished every vestige of authority over the land save for the reservation of the right of service of all civil and criminal process of the courts of this state. Following the acquisition of this land by the United States in the manner stated sole and exclusive jurisdiction, political dominion and sovereignty became vested in the latter and continues to be vested in it. The following cases constitute but few of a vast number of reported decisions touching the matter of jurisdiction of the United States over lands and other property owned by it: *Fort Leavenworth Railroad Company* v. *Lowe*, 114 U. S. 525; *United States* v. *Cornell*, 2 Mason 60; *Commonwealth* v. *Clary*, 8 Mass. 72; *Mitchell* v. *Tibbitts*, 17 Pickering 298; *Foley* v. *Shriver*, 81 Va. 568; *Ackerley* v. *Commercial Credit Company*, 111 Fed. Supp. 92; *Surplus Trading Company* v. *Cook*, 281 U. S. 647 and *Mater* v. *Holley et al*, 200 Fed. 2d 123. "It necessarily follows that a state and the subordinate taxing units thereof are without power to subject to taxation the property of the Federal Government or the means, instrumentalities and agencies thereof which it employs to carry out its proper functions, unless Congress expressly confers a right upon the state to tax such agencies, instrumentalities or property." 51 Am. Jr. page 279. Thus it is seen that the leased land, being owned in fee simple by the United States and over which it exercises exclusive jurisdiction cannot be reached by assessment for the purpose of taxation by the state or any political subdivision thereof. "A state's power of taxation, however vast in its character and searching in its extent, is confined to subjects which are within its jurisdiction, and the tax laws of a state can have no extraterritorial operation." 51 Am. Jur. page 88.

However, from the terms of the lease itself and from the explicit provisions of the statute (Title 34-522e

U.S.C.A.) we find that the Congress of the United States has expressly consented to the taxation of the lessee's interest. As succinctly stated by the highest court of the State of Maryland in the case of *Meade Heights, Incorporated, et al* v. *State Tax Commission,* 95 Atlantic (Maryland) 280, "In the instant case, Congress has definitely consented to the taxation of the lessee's interest, *whatever that may be.*" (*Underscoring supplied*). It would seem imperative to comment upon the latter case in some detail because the same circumstances were there involved and substantially the same contentions there made as here.

There the appellant corporations leased five parcels of land from the United States and constructed apartment projects thereon; the land in each case being located within military and other reservations over which the United States exercised exclusive jurisdiction. The County Commissioners of Anne Arundel and Hartford Counties assessed the appellants for taxation, both as to the land and buildings. On appeal, the State Tax Commission reversed the assessments as to the land but sustained them as to the buildings. There, the lease was made under the authority of Public Law 364 (Title 10 U.S.C.A. 1270), Section 1270d provides as does Section 522e of Title 34, for the taxation of the Lessee's interest. The lease for Maryland land was for a like duration of seventy-five years but it differs from the one at hand in that it contained express provision that title to all of the improvements erected on the land should be and remain in the lessee and that, upon termination of the lease, the lessee should have the right to remove the improvements if it so desired. The State Tax Commission and the trial court held that the appellants had the only substantial interest in the buildings so erected and could be assessed with the full value thereof. The appellant

contended that it did not hold complete interest in the buildings and that an assessment measured by their full value went beyond the permissible limits of state taxation as fixed by Congress, and that Maryland law did not authorize the taxation of any interest in property less than a fee simple interest. The first contention was supported by the United States as an intervening party.

It was pointed out by the court that under the laws of Maryland the owner of a leasehold could be assessed and taxed on the full value of the improvements which it erected even though the fee was tax exempt. Section 7 (1) Article 81 of the Code of Maryland of 1951 provides for the assessment to the owner and taxation for ordinary taxes of "All real property in this state, by whomever owned, including that owned by the United States, or any department or agency of the United States, to the fullest extent possible under the Constitution of the United States and the laws of the United States pursuant thereto and in conformity therewith." Section 3(c) of the same Article provides that "the owner of certain limited interests in real estate and personal property shall be treated as the owner in fee for the purposes of taxation." Section 2(12) of the same Article provides that "Real Estate shall include leaseholds, unless such construction would be unreasonable."

The appellants argued that the retention of control by the United States in the form of agreements not to sublease except to military personnel and at approved rental figures constituted interests belonging to the Government which should have been excluded from assessment. On that point the court had this to say: "Under the terms of the lease, we think that the Government has committed itself to the legal proposition that title to the buildings is in the lessee." It was further stated that the "Lessee's interest referred to in the federal statute is described in

the lease as the 'leasehold interest' and the tax contemplated by the statute is referred to in the lease as a tax upon the leased property. The interest to the taxation of which Congress has consented is a property interest and the fact that it is not wholly free from restrictions as to use does not detract from the quality of the legal estate in the lessee and render it immune from taxation." Finally, it was held that the most that could be claimed was that the assessment was too high because the valuation did not take into consideration the possible diminution in value due to the restrictions upon the use.

While exceedingly helpful I do not consider the opinion of the Maryland court decisive of the issues here presented because of what it revealed by the pertinent taxation statutes of Maryland and because of the difference of language of the two leases with respect to title to the improvements erected on the leased property. Counsel for Prince William County contends that by virtue of Paragraph Eleven of the lease under consideration only such replacements as may be made on the leased property remaining upon the expiration of the lease shall remain on the leased premises and be the property of the Government without compensation and that any improvements erected and not replaced are owned in fee and may be removed by the lessee. I am constrained to disagree with this conclusion as the terms of the Maryland lease and also the Fort Belvoir lease referred to by counsel for both parties hereto obviously cannot have the same intended meaning. If the lease at hand had contemplated that title to the improvements should be and remain in the lessee with a right on its part to remove the same upon the expiration of the term I can perceive no reason why it should not have so stated in clear unambiguous language. This lease provides that upon its expiration or earlier termination "all improvements made upon the

leased premises *and* all ranges, refrigerators, screens, shades and other items required to be furnished with the improvements . . . shall remain on the leased premises and be the property of the Government without compensation; . . . ". The provision for the replacement of "*any such items*" manifestly refers to such items as ranges, refrigerators, screens, shades and the like as distinguished from the buildings themselves. For example, suppose that during the term of the lease a refrigerator has to be replaced does the applicant have to turn the old refrigerator over to the United States? Obviously not. He may replace the old one with a new one but the refrigerator in place at the termination of the lease becomes the property of the Government. It is my opinion that the title to the improvements themselves is vested in fee simple in the United States of America subject to the leasehold interest of the applicant, which is the right on the applicant's part to use the land and buildings during the term of the lease, subject to the conditions and restrictions therein contained.

Supplementing the expressed provision of the lease to the effect that the improvements shall remain on the premises and be the property of the Government we find the following statement contained in 11 Michie's Jurisprudence, page 729:

> "Where the terms of a lease require the lessee to erect buildings upon the leased premises, and there is no agreement for their removal by the lessee, he has no right to remove them. And the general rule is that buildings form a part of the freehold, and cannot be removed by the tenant at the end of his lease. A fortiori, where the lease in terms provides that the lessee shall surrender the buildings upon the premises at the termination of the lease, in the absence of ambiguity and allegation of fraud or mistake, this must govern."

In the case of *People* v. *Barker*, 153 N. Y. 98, it was held that a shed erected by a lessee upon property leased from the city of New York, under a lease requiring its erection and providing that it is "to become the property of the city on the expiration of the lease," became the property of the city on being erected and affixed to the realty. It was further therein held that the same was not assessable for taxation as property of the lessee.

The case before us, in which the applicant has a leasehold interest for a fixed period of years presents, I believe, a different situation than that confronting the court in the case of *City of Norfolk* v. *Perry Company et al*, 108 Va. 28. There involved was a lease of land from the then Borough of Norfolk for a period of ninety-nine years, renewable forever. Contained in the lease was a provision that the lessee covenants for himself, his executors and assigns, to "pay or cause to be paid to the person or persons authorized to receive the same the public taxes which shall become due on said land." The appellees erected buildings on the land and were, in the year 1906, assessed for taxation as to both land and buildings. It is interesting to note that the land was assessed in the name of the city and the buildings assessed in the name of the appellees. In upholding the validity of the assessment the court had this to say. "It is true that, as a general rule, in the absence of a covenant, the landlord under an ordinary lease is responsible for taxes on the property leased by him; but this general rule can have no application to the case of a perpetual leaseholder, where the tenant is in effect the virtual owner of the property and entitled to its use forever." The appellees further contended that the buildings could not be assessed separately in their names, but that the land and buildings should be assessed together in the name of the lessor. While not passing on the validity of this mode of assess-

ment the court had this to say about it: "If it were conceded that the mode of assessment adopted was wrong, and that suggested by the appellees proper, it would be harmless error. If having both the land and the buildings assessed in the name of the lessor, be of advantage to the appellees, and they have the right to have them so assessed, their remedy at law, by motion, is adequate to have the assessment corrected in that particular."

It seems to me that throughout the entire consideration of the matter before us it must be constantly borne in mind that the applicant has been assessed with real estate taxes on the improvements erected in the same manner that he would have been had he been the fee simple owner of the real estate on which said improvements were erected and that he has not been assessed with this leasehold interest. It would, however, serve no useful purpose to resolve the issue here presented solely on the ground that the improvements are a part of the real estate; that both the real estate and improvements thereon are owned in fee by the United States of America; that the Congress of the United States has not given its consent, either expressly or impliedly, to the taxation of its property by state or local governments but has only consented to the taxation of the lessee's interest. I believe it to be incumbent to also inquire and resolve whether or not, under the present laws of this Commonwealth, a leasehold interest can be assessed for taxation to the holder of the lease and whether such leasehold assessment can be classified as real estate.

It would appear that the General Assembly of Virginia at the 1954 Session thereof had some misgivings on the subject for Section 58-758 of the Code of Virginia of 1950 was amended and reenacted thus:

"Title 58-758: All taxable real estate having been

segregated by law for local taxation only, such taxable real estate shall be assessed for local taxation in accordance with the provisions of this chapter and other provisions of law. *For the purpose of this chapter, and other provisions of law relating to the assessment of real estate for taxation, the term 'taxable real estate' shall include a leasehold interest in every case in which the land or improvements, or both, as the case may be, are exempt from taxation to the owner.* This chapter shall not apply to the assessment of any real estate assessable under the law by the State Corporation Commission. *This section, as hereby amended, shall apply to the tax year beginning January first, nineteen hundred and fifty-five, and to every tax year thereafter until otherwise provided by law.*"

The amendment to the foregoing statute appears as the portions therein *underscored*. I have been unable to find any reference to a leasehold interest in any statute relating to taxation prior to the amendment to the statute set forth above. However, in Title 1-13 of the Code providing for rules of construction we see the words "land" and "real estate" defined as follows:

> "Title 1-13.12. Land, real estate.—The word 'land' or 'lands' and the words 'real estate' shall be construed to include lands, tenements and hereditaments, and all rights and appurtenances thereto and interests therein, other than a chattel interest."

The words "and appurtenances" were inserted in the statute by the amendment of 1950. Also defined in the same Title is "personal estate" and it is defined therein as follows:

> "Title 1-13.20. Personal estate.—The words 'personal estate' shall include chattels real and such other estate as, upon the death of the owner intestate, would devolve upon his personal representative."

In Michie's Jurisprudence, Volume 11, page 635, it is stated:

> "A leasehold, separate from the fee from which it has been carved, is property which the law recognizes as a thing of value, but is incorporeal and infangible in its nature."

and in Minor on Real Property, Volume I, Section 357, there appears the following statement:

> "Estates for years are chattels real, and, upon the death of the owner intestate, go to his personal representative, and not to his heir, while a freehold estate, independently of statute, never goes to the owner's personal representative."

In West Virginia the law is well settled that leasehold estates are taxable as such but they are there taxed as intangible personal property for reason that they are chattels real. *Harvey Coal and Coke Company* v. *Dillon, et al.* 53 S. E. (West Va.) 928; *Greene Line Terminal Company* v. *Martin, Assessor, et al.* 10 S. E. 2d (West Va.) 901. The case of *Harvey Coal and Coke Company* v. *Dillon et al., supra,* contains a most comprehensive discussion as to the character and nature of leasehold estates.

At the sixth page of his reply brief, counsel for the county seems to be of the opinion that the assessment should appear on the personal property books rather than the land books for he has this to say: "It may well be that the technically correct assessment in this case should have been against the 'United States Government' or the 'Contracting Officer,' since Congress has consented to the tax and has set up machinery for effectuating imposition of such a tax. If the correct assessment should be against the 'United States of America' as long as this lease is in force, then it isn't too late to make that correction; the tax is already paid and no hardship will fall on anyone. Probably, the assessments should be changed so they will

be on tangible personal property and taken out of the 'land book.' This can easily be done."

If the leasehold interest here involved properly comes under the classification of tangible personal property then I would agree with the conclusion above for the remedy of the applicant would not be by way of seeking exoneration of taxes but he would be left to his remedy of having the assessment corrected in that particular. Further, if it complains that the assessment is too high in that it does not take into consideration various elements which should be considered in making the assessment, there also the applicant would have a proper and adequate remedy.

However, I have been unsuccessful in attempting to arrive at a conclusion which would permit the assessment to be classified as tangible personal property taxable under the applicable statutes by the localities. Instead, it seems inescapable that the lessee's leasehold interest is properly to be classified as intangible personal property and, as such, taxable by the State. Title 58-405, Code of Virginia of 1950. Even then it becomes an interesting question as to whether the present laws are sufficiently broad to permit the assessment on the basis of intangible personalty for as said by the Court of Appeals in *Willis* v. *Commonwealth*, 97 Va. 667, "It is not the province or within the power of the court to make assessment. No property can be assessed with taxes until the legislature has made proper provision for this purpose."

In reaching this conclusion I am not unmindful of the fact that were the imposition of the tax to be sustained no pecuniary loss would be suffered by the United States nor do I believe that the applicant would suffer from the payment of the taxes. I would assume that the lease would be renegotiated in order to take into consideration the taxes paid and an increase in rents would probably ensue.

This conclusion, however, cannot be permitted to play any part in the determination of the issues presented in the light of what I believe to be the law.

It follows that this court must enter an order declaring the assessment erroneous and directing the Treasurer of Prince William County, Virginia, to refund to the applicant the amount of the taxes paid by it under protest for the years 1952 and 1953.

.....

Judge.

E.

STATUTES INVOLVED.

1. The Wherry Military Housing Act of August 8, 1949, 63 Stat. 570, 12 U. S. C. § 1748, which added Title VIII—Military Housing Insurance to the National Housing Act. The pertinent provisions read as follows:

> "Sec. 803. (a) In order to assist in relieving the acute shortage of housing which now exists at or in areas adjacent to military installations because of uncertainty as to the permanency of such installations and to increase the supply of rental housing accommodations available to military and civilian personnel at such installations, the Commissioner is authorized, upon application of the mortgagee, to insure mortgages (including advances on such mortgages during construction) which are eligible for insurance as hereinafter provided, and, upon such terms as the Commissioner may prescribe, to make commitments for so insuring such mortgages prior to the date of their execution or disbursement thereon: *Provided*, That the aggregate amount of principal obligations of all mortgages insured under this title shall not exceed $500,000,000 except that with the approval of the President such aggregate amount may be increased to

not to exceed $1,000,000,000: *And provided further*, That no mortgage shall be insured under this title after July 1, 1951, except (A) pursuant to a commitment to insure issued on or before such date, or (B) a mortgage given to refinance an existing mortgage insured under this title and which does not exceed the original principal amount and unexpired term of such existing mortgage.

"(b) To be eligible for insurance under this title a mortgage shall meet the following conditions:

"(1). The mortgaged property shall be held by a mortgagor approved by the Commissioner. The Commissioner may, in his discretion, require such mortgagor to be regulated or restricted as to rents or sales, charges, capital structure, rate of return, and methods of operation. The Commissioner may make such contracts with, and acquire for not to exceed $100 stock or interest in, any such mortgagor, as the Commissioner may deem necessary to render effective such restriction or regulation. Such stock or interest shall be paid for out of the Military Housing Insurance Fund, and shall be redeemed by the mortgagor at par upon the termination of all obligations of the Commissioner under the insurance.

"(2) The mortgaged property shall be designed for rent for residential use by civilian or military personnel of the Army, Navy, Marine Corps, or Air Force (including Government contractors' employees) assigned to duty at the military installation at or in the area of which such property is constructed. Notwithstanding the provisions of any other law, preference or priority of opportunity in the occupancy of the mortgaged property for such personnel and their immediate families shall be provided under such regulations and procedures as may be prescribed by the Commissioner. No mortgage shall be insured under this title unless the Secretary of Defense or his designee shall have certified to the Commissioner that the housing with respect to which the mortgage is made is necessary to provide adequate housing for such personnel, that such installation is deemed to be a

permanent part of the Military Establishment, and that there is no present intention to substantially curtail activities at such installation.

"(3) The mortgage shall involve a principal obligation in an amount—

"(A) not to exceed $5,000,000; and

"(B) not to exceed 90 per centum of the amount which the Commissioner estimates will be the replacement cost of the property or project when the proposed improvements are completed; and

"(C) not to exceed an average of $8,100 per family unit for such part of such property or project as may be attributable to dwelling use, except that where the Secretary of Defense or his designee in exceptional cases certifies and the Commissioner concurs in such certification that the needs would be better served by single-family detached dwelling units the mortgage may involve a principal obligation not to exceed $9,000 per family unit for such part of such property as may be attributable to such dwelling units.

* * * * *

"Sec. 805. Whenever the Secretary of the Army, Navy, or Air Force determines that it is desirable to lease real property within the meaning of the Act of August 5, 1947 (61 Stat. 774), to effectuate the purposes of this title, the Secretary concerned is authorized to lease such property under the authority of said Act upon such terms and conditions as in his opinion will best serve the national interest without regard to the limitations imposed by said Act in respect to the term or duration of the lease, and the power vested in the Secretary of the Department concerned to revoke any lease made pursuant to said Act in the event of a national emergency declared by the President shall not apply. Whenever the Secretary of the Army, Navy, or Air Force determines it to be in the interest of national defense, he is hereby authorized to sell, transfer, and convey at fair value (as determined by him), for use under this title, all or any right, title, and interest in any real property under his jurisdiction, notwithstanding any limita-

tions or requirements of law with respect to the use or disposition of such property. The authority conferred by this section shall be in addition to and not in derogation of any other power or authority of the Secretary of the Army, Navy, or Air Force.

* * * * * * *

"Sec. 807. Nothing in this title shall be construed to exempt any real property acquired and held by the Commissioner under this title from taxation by any State or political subdivision thereof, to the same extent, according to its value, as other real property is taxed."

2. Military Leasing Act of August 5, 1947, 61 Stat. 774, 5 U. S. C. § 626s.

"[Section 1] * * * whenever the Secretary of War or the Secretary of the Navy [or the Secretary of the Air Force] shall deem it to be advantageous to the Government he is authorized to lease such real or personal property under the control of his Department as is not surplus to the needs of the Department within the meaning of the Act of October 3, 1944 (58 Stat. 765), and is not for the time required for public use, to such lessee or lessees and upon such terms and conditions as in his judgment will promote the national defense or will be in the public interest. Each such lease shall be for a period not exceeding five years unless the Secretary of the Department concerned shall determine that a longer period will promote the national defense or will be in the public interest. The Secretary of the Department concerned may include, among other terms and conditions in the lease, a right of first refusal in the lessee to purchase the property in the event of the revocation of the lease in order to permit sale thereof by the Government, but this section shall not be construed as authorizing the sale of any property unless the sale thereof is otherwise authorized by law. Each such lease shall contain a provision permitting the Secretary of the Department concerned to revoke the lease at any time, unless the Secretary shall determine that the omission of such provision

from the lease will promote the national defense or will be in the public interest. In any event each such lease shall be revocable by the Secretary of the Department concerned during a national emergency declared by the President. Notwithstanding section 321 of the Act of June 30, 1932 (47 Stat. 412; U. S. C., title 40, sec. 303b), or any other provision of law, any such lease may provide for the maintenance, protection, repair, or restoration by the lessee, of the property leased or of the entire unit or installation where a substantial part thereof is leased, as a part or all of the consideration for the lease of such property. In the event utilities or services shall be furnished by the Department concerned to the lessee in connection with any lease, payments for utilities or services so furnished may be covered into the Treasury to the credit of the appropriation or appropriations from which the costs of furnishing any such utilities or services to the lessee was paid. Except as otherwise hereinabove provided, any money rentals received by the Government directly under any such lease shall be deposited and covered into the Treasury as miscellaneous receipts. The authority herein granted shall not apply to oil, mineral, or phosphate lands. The Secretary of War or the Secretary of the Navy, as the case may be, shall submit to the Congress on the 1st day of January and the 1st day of July of each year, following the enactment of this law, a report of all leases entered into in accordance with the provisions of this Act.

"Sec. 5. (a) Whenever in the opinion of the Secretary of War or the Secretary of the Navy, as the case may be, the interests of national defense require assurance of the continued availability for war-production purposes of the industrial capacity of shipyards, plants, and equipment which are surplus to the needs of their respective Departments or of the Reconstruction Finance Corporation within the meaning of the Surplus Property Act of 1944, they are authorized to direct the imposition of such terms, conditions, restrictions, and reservations in the disposition of such property by the disposal agency under said Act as will in the opinion of the Secretary concerned be adequate to assure such continued availability.

(b) In the event the disposal agency is unable to dispose of any such industrial plants and equipment subject to such terms, conditions, restrictions, or reservations as have been imposed, within a reasonable time and after such property shall have been offered for sale and reasonable efforts made to dispose of the same, the Department imposing such terms, conditions, restrictions, or reservations shall (1) modify them to the extent necessary to permit the sale or lease of such property, (2) withdraw the property from surplus, or, in the case of Reconstruction Finance Corporation property, request a transfer thereof in the manner provided in sections 3 (a) and 4 of this Act, or (3) eliminate and waive the requirement for the imposition of any terms, conditions, restrictions, or reservations made under the authority of this section.

"Sec. 6. The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of this Act shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated."

3. Housing Amendments of 1955, Public Law No. 345, Ch. 783, 84th Cong. 1st Sess., Approved August 11, 1955. Title VIII of the National Housing Act was amended to read as follows:

"Sec. 803. (a) In order to assist in relieving the acute shortage and urgent need for family housing which now exists at or in areas adjacent to military installations because of uncertainty as to the permanency of such installations and to increase the supply of necessary family housing accommodations for personnel at such installations, the Commissioner is authorized, upon application of the mortgagee, to insure mortgages (including advances on such mortgages during construction) which are eligible for insurance as hereinafter provided, and, upon such terms as the Commissioner may prescribe, to make commitments for so insuring such mortgages prior to the date of their execution or disbursement thereon: *Provided,* That the aggregate amount of principal obligations of all mortgages insured under this title shall not exceed $1,363,500,000: *And provided further,* That the limitation in section 217 of this Act shall not apply to this title: *And provided further,* That no mortgage shall be insured under this title after September 30, 1956, except pursuant to a commitment to insure issued before such date.

. . . . . .

"Sec. 805. Whenever the Secretary of the Army, Navy, or Air Force determines that it is necessary to lease any land held by the United States on or near a military installation to effectuate the purposes of this title, he may lease such land upon such terms and conditions as will, in his opinion, best serve the national interest. The authority conferred by this section shall be in addition to and not in derogation of any other power or authority of the Secretary of the Army, Navy, or Air Force.

. . . . . .

"Sec. 807. The Commissioner is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this title. In the performance of, and with respect to, the functions, powers, and duties vested in him by this title, the Commissioner, notwithstanding the provisions of any other law, shall appoint a Special Assistant for Armed Services Housing for Mortgage Insurance, and provide the Special Assistant with adequate staff, whose whole responsibility will be to expedite operations under this title and to eliminate administrative obstacles to the full utilization of this title under the direction and supervision of the Commissioner."

The 1955 statute contains the following savings provision:

"Sec. 408. Notwithstanding the provisions of section 401 of this Act, the provisions of title VIII of the National Housing Act in effect prior to the enactment of the Housing Amendments of 1955 shall continue in full force and effect with respect to all mortgages insured pursuant to a certification by the Secretary of Defense or his designee made on or before June 30, 1955, and a commitment to insure issued on or before June 30, 1956 or pursuant to a certification by the Atomic Energy Commission or its designee made on or before June 30, 1956, except that the maximum dollar amount for each such mortgage shall be $12,500,000."

No. 404

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

OFFUTT HOUSING COMPANY, A CORPORATION,
Petitioner,

vs.

COUNTY OF SARPY AND ROBERT M. EBY, TREASURER OF COUNTY OF SARPY, NEBRASKA,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

BRIEF FOR PETITIONER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 404.

OFFUTT HOUSING COMPANY, A CORPORATION,
Petitioner,

vs.

COUNTY OF SARPY AND ROBERT M. EBY, TREASURER OF COUNTY OF SARPY, NEBRASKA,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

BRIEF FOR PETITIONER.

REFERENCE TO OPINIONS BELOW.

The opinion of the Supreme Court of Nebraska (R. 195-214) is reported in 160 Neb. 320, 70 N. W. 2d 382. The opinion (oral) of the District Court of Sarpy County, Nebraska, which is unreported, is printed in the Appendix to the Petition for Certiorari at pp. 5-18. The findings and judgment of the District Court appear at R. 20-27.

JURISDICTION.

The judgment of the Nebraska Supreme Court (R. 194) was entered on May 6, 1955. A timely petition for rehearing was filed on May 26, 1955 (R. 214) and denied on June

24, 1955 (R. 214). The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3), since a right and immunity is especially set up and claimed under the Constitution and statutes of the United States. The petition for certiorari was granted on November 14, 1955 (R. 215).

QUESTION PRESENTED.

The United States leased to petitioner for 75 years land on an Air Base subject to the exclusive jurisdiction of the United States, for the construction and operation of housing for Air Force personnel. Title to the buildings was vested in the United States. The question presented is whether Nebraska may collect from petitioner a property tax (1) on the buildings and (2) on household appliances and office equipment located in the buildings and owned by petitioner. This involves the question whether Congress has waived the immunity of such property from state taxation. Subordinate questions, both of which must be answered in the affirmative if respondents are to prevail, are:

(1) Whether the Wherry Military Housing Act contains any Congressional waiver of immunity from state taxation for property located on enclaves over which the United States has exclusive jurisdiction.

(2) If so, does a tax on the full value of the buildings, appliances and equipment come within the terms of a statute permitting a tax on the "lessee's interest," made or created pursuant to the provisions of that Act.

STATUTES INVOLVED.

The pertinent provisions of the Wherry Military Housing Act of August 8, 1949, 63 Stat. 570, 12 U. S. C. § 1748, both before and after the amendments of August 11, 1955, and of the Military Leasing Act of August 5, 1947, 61 Stat. 774, 5 U. S. C. § 626a-3 *et seq.*, are quoted in the Appendix,

infra, pp. 61-68. The statutory framework which gives rise to this case may be outlined as follows:

In 1949 the military establishment was faced with a problem of loss of skilled personnel because of lack of sufficient housing facilities and the "deplorable" housing conditions at military installations (S. Rept. No. 410, p. 2, H. Rept. No. 854, p. 4, 81st Cong., 1st Sess.[1]). Although in the past, when the Armed Services were small, the Government itself had provided living quarters for service men (H. Rept. No. 854, p. 4), to have provided the estimated 261,555 family units needed in 1949 would have cost the Government from two to three billion dollars (S. Rept. No. 410, p. 3; H. Rept. No. 854, p. 4). To meet this need at

1. "Representatives of the three branches of the National Military Establishment, appearing before your committee, strongly urged the enactment of this measure. They stressed, in terms of the efficiency of the armed services, the urgent need for adequate housing facilities to serve families of their personnel. They made it abundantly clear that, to attract and hold the highly trained, experienced, and technical personnel now required by the Departments of the Army, the Navy, and the Air Force, it is essential that this personnel be afforded an opportunity to live comfortable and normal lives, insofar as military duty permits, on a reasonable parity in terms of housing, with the average American citizen. The fact that most of them do not now have this privilege is a major contributing factor to the existence of a morale problem that bears on the effectiveness of our armed forces, to the difficulties in recruiting able men, and to the large percentage of trained men who are failing to reenlist at the expiration of their enlistment terms.

"Adequately training men to maintain and operate our present-day intricate war machines is an extensive and costly undertaking. Whenever a trained man fails to reenlist, the investment of the Government in his training is lost to the armed services involved and another man must be given similar training. The Air Force in September 1948 made an analysis of its enlisted personnel which indicated that only 59 percent of all married enlisted personnel intended to reenlist. However, 79 percent indicated that they would reenlist if the Government were to provide family housing. Those failing to reenlist include some of the best trained and most able men." H. Rept. No. 854, 81st Cong., 1st Sess., p. 4.

The problem still exists in 1955. See Senate Report No. 404, 84th Cong., 1st Sess., p. 19, on the Housing Act Amendments of 1955.

slight cost to the Government, through utilizing the services of private enterprise, the Wherry Act amended the National Housing Act (by adding Title VIII) so as to authorize the Federal Housing Administration (FHA) to insure mortgages on housing at or in the area of military installations, upon the certificate of the Secretary of Defense that such housing

> "is necessary to provide adequate housing for such personnel, that such installation is deemed to be a permanent part of the Military Establishment, and that there is no present intention to substantially curtail activities at such installation." (§ 803, 63 Stat. 570, 12 U. S. C. § 1748b (b) (2)).

The Act also authorized the Secretaries of the military services to lease federal land for housing purposes (§ 805, 63 Stat. 570, 12 U. S. C. § 1748d). The House Report (No. 854, 81st Cong., 1st Sess., p. 2) stated that:

> "* * * difficulties in obtaining suitable sites is frequently a deterrent to the development of housing by private enterprise in the vicinity of military installations, particularly in isolated areas. The leasing of such sites by the Military Establishment at nominal considerations would further make possible the achievement of lower rentals for the personnel of the establishment."

The Senate Report (S. Rept. 410, 81st Cong., 1st Sess., pp. 3-5, 8) expresses concern over whether the program will provide housing at rentals within the financial reach of the lower grades of military personnel, and states (pp. 4-5):

> "Your committee believes that every effort should be made to provide housing at rents within the means of as many enlisted personnel and junior officers as possible."

Section 805 of the 1949 Act authorized the leasing of property "under the authority of" the Act of August 5,

1947 (61 Stat. 774, 5 U. S. C. § 626s-3), without regard to limitations imposed by said Act with respect to the term or duration of the lease. The Act of 1947 had been enacted to permit the Secretaries of the Armed Services to lease for long terms industrial plants and facilities built by the Government at great expense during the war, which the Government wished to keep in stand-by status but which could be usefully operated by private industry when not needed for military purposes. (H. Rept. No. 623, 80th Cong., 1st Sess., p. 3). Section 6 of the 1947 Act (61 Stat. 775, 5 U. S. C. § 626s-6) provides:

> "The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of this Act shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated."

The purpose of the first sentence of this provision was to remove any doubt as to whether the interest of the lessee, as distinct from that of the Government as owner of the title, could be taxed in states which permitted taxes upon leasehold interests (see pp. 29-32, *infra*). The second sentence was intended to permit renegotiation of the lease, if Congress by subsequent legislation permitted local taxation of the property leased, which means the property owned by the Government (H. Rept. 623, 80th Cong., 1st Sess., p. 3).

In 1955 the Title of the Housing Act dealing with military housing was revised (Public Law 345, 84th Cong.) so as to eliminate for future projects the provisions of the 1949 Act here relied upon as waivers of immunity from local taxation.[1] Housing constructed by private contractors

1. The new versions of Sections 805 and 807 are printed in the Appendix, *infra*., p. 64.

under the 1955 Act will be operated as well as owned by the Government, which insures that it will not be taxable by States and localities. But Section 408 of the 1955 Act leaves the prior law applicable to projects certificated before June 30, 1955. The significance of the 1955 Act here is that it shows that after experience under the 1949 law and an increasing body of litigation in which a number of states were beginning to attempt collection of property taxes, Congress turned to a method of providing military housing which would not on any theory be subject to local taxation.

STATEMENT.

This is a suit by petitioner against the County of Sarpy and its Treasurer for a declaratory judgment that it is not required to pay the County certain taxes assessed against it and for ancillary injunctive relief (R. 1-8). The District Court for Sarpy County adjudged that Nebraska had no authority to impose the taxes in question (R. 20-27) but the Supreme Court of Nebraska reversed (R. 194-214).

The facts are not in dispute. Offutt Air Force Base (formerly Fort Crook), the headquarters of the Strategic Air Command (R. 39), is owned by and subject to the exclusive jurisdiction of the United States.[2] The Commander of the Base determined that a housing project was needed in order to secure and retain skilled personnel (R. 40, 43-45), and the Department of the Air Force submitted to the FHA the certificate required by the Wherry Act (Ex. 3, R. 130-131, 28) that the housing project is necessary to provide adequate housing for military personnel assigned to duty at that installation.

The Air Force and the FHA thereupon proceeded with

2. Nebraska ceded exclusive jurisdiction (Neb. R. R. S. 1943, §§ 72-601, 602, 604), and the United States has accepted it (Ex. 2, 2(a), R. 125-130, 28).

the project. On January 18, 1951, the Air Force leased 63 acres of land on the Air Base to petitioner, to be used for the erection of a 611-unit housing project, in accordance with project specifications approved by the Air Force and the FHA (Ex. 4, R. 132-143, 28). Some of this land had been donated to the United States in 1949 by the Omaha Chamber of Commerce (R. 118, 126, 189). The United States had immediately accepted exclusive jurisdiction over the property, with the consent of the Governor of Nebraska (Ex. 2, R. 125-126, 28).

The lease was in the standard form used by the Air Force under the Wherry Act at that time (R. 68, 75). Only a nominal rental of $100 per year was to be paid to the Government (Ex. 4, R. 133), in order "to keep the rents down" for the subtenants (R. 76-77).[3] Tenants were to be designated by the Commanding Officer from among personnel of the Air Force; only if Air Force personnel were not designated or available could the lessee rent to other persons (Ex. 4, R. 134).

Paragraph 11 of the lease, which provides that title to the buildings shall be in the United States, reads as follows (Ex. 4, R. 138):

> "That upon the expiration of this lease, or earlier termination, all improvements made upon the leased premises *shall remain the property of the Government* without compensation, provided that the provisions

3. The nominal character of the rental paid the Government made meaningless Paragraph 8 of the lease (Ex. 4, R. 137), which provided for renegotiation and reduction of the rental if Congress consented to the imposition of taxes "upon the property owned by the Government and included in this lease (as opposed to the leasehold interest of the Lessee therein)." Paragraph 8 also provided:

> "That the Lessee shall pay to the proper authority, when and as the same become due and payable, all taxes, assessments, and similar charges which, at any time during the term of this lease, may be taxed, assessed or imposed upon the Government or upon the Lessee with respect to or upon the leased premises."

of this Condition shall not apply to facilities erected by utility companies on the leased premises for the purpose of furnishing utility services to the housing project. The buildings and improvements erected by the Lessee, constituting the aforesaid housing project, *shall be and become, as completed, real estate and part of the leased land, and public buildings of the United States,* leased to Lessee for the purpose of serving the governmental and public purpose of providing military housing in accordance with Title VIII of the National Housing Act, and in accordance with the provisions of this lease, and subject to the term of this lease, and any renewal or extension of this lease." (Emphasis supplied.)

Other provisions of the lease require the lessee to protect the premises against fire, to comply with rules as to use and occupancy prescribed by the Commander, to permit Government inspection, to maintain the property in satisfactory condition, all disputes as to maintenance after termination of the mortgage being decided by the Air Force, and to repair, replace or pay the United States for any damaged or destroyed property (Ex. 4, R. 138-141). The lease could not be transferred or assigned "without the prior written approval of the Secretary of the Air Force" (R. 136).

Maximum rentals were to be fixed by the FHA with the concurrence of the Air Force[4] and could not be increased without the consent of the FHA (R. 68, 93, 66-67, 73-74, 88, 91; Ex. 8, Art. V, VII, R. 150, 152, 30; Ex. 14, R. 167n, 169, 89; FHA Rules and Regulations, Sec. V, Para. 4, Ex. 12, R. 161-162). In establishing the original maximum rentals, the military authorities "take into consideration the ability of the base personnel to pay" (R. 66, 91); they are "interested in keeping the rents as low as possible" (R. 93). Rentals varied with the rank of the tenant, so

4. After expiration of the mortgage insurance, rentals are subject to the control of the Air Force (Ex. 4, R. 136, 141).

1. The Wherry Act Contains No Waiver of Immunity.

No such legislative intention was manifested when the Wherry Act was enacted in 1949. No one could tell from reading the statute on its face that there was any waiver of the immunity from State taxation of property on Federal enclaves. The only pertinent comment in the course of the legislative history reflects an understanding that housing built on government reservations would not be taxable. During the Hearings before the House Committee, after Housing and Home Finance Administrator Foley had stated that he did not know what proportion of the projects would be built on Government-owned property, the following colloquy occurred (Hearings on Military Rental Housing before House Committee on Banking and Currency, H. R. 4491, 81st Cong., 1st Sess., p. 37):

> "Rep. Nicholson. If they were built on land other than the reservation, the housing would be taxed, would it not?
>
> "Mr. Foley. You mean buildings on lands adjacent to military installations but not owned by the military?
>
> "Rep. Nicholson. That is right. That would be subject to tax by the local community * * *."

Neither the Administrator nor anyone else at that time or later suggested that Rep. Nicholson's statement, which implied that only housing built off the reservations could be taxed, was too restrictive. If the Administrator or any of the Congressmen present had thought that buildings on as well as off the reservations would be subject to taxation, Mr. Nicholson's statement would not have been likely to go without comment.

The only section of the Wherry Act which dealt directly with state taxation is Section 807 (before 1955 amendment) (63 Stat. 570, 12 U. S. C. § 1748f), which provided that:

> "Nothing in this Title shall be construed to exempt any real property acquired and held by the [Federal

that lower-paid military personnel would pay less than officers (Ex. 14, R. 167; R. 64-65, 58-59). Rentals ranged from $51.25 to $67.25 for enlisted men, and from $68.25 to $89.25 for officers, depending on the number of rooms (Ex. 14, R. 167). These rentals are lower than those for comparable housing off the Base (R. 50).

Rentals were established by the Air Force and the FHA on the assumption that no state or local taxes would be paid (Ex. 13, R. 164, 87; R. 42-43, 56). The rentals originally fixed and in effect at the time of trial were based upon the Project Analysis of the FHA (Ex. 13, R. 163-166).[5] This Analysis contains the statement (R. 164) that it is "Processed on the assumption that the projects will not be subject to State, County or School Property Tax. If such taxes are assessed, rents will have to be adjusted accordingly." If such taxes are payable, the cost will be passed on in the form of higher rentals to the tenants of the project (R. 43, 91-92, 164).[6] This decreases the likelihood that skilled personnel will remain in the Air Force (R. 62-63, 45).

Petitioner is required to provide and maintain household appliances in the apartments (R. 111). At the expiration of the lease such appliances or their replacements must be left in the buildings as the property of the Air

5. Respondents (Br. in Opp., p. 6) and the court below (R. 201) quote figures from the FHA Project Analysis (Ex. 13, R. 163-166) in a way which implies that petitioner is making large profits from this operation. But respondents fail to deduct the amortization charges (estimated by FHA at $296,946 for debt service requirements (R. 166)), which far exceed all other cost items, from their "net annual income" figure of $326,798. The Project Analysis, of course, contemplated not only low rentals for the military subtenants, but also a reasonable profit for the lessee; no one would undertake a project unless it was planned on that basis. In fact, however, the record shows that petitioner's operation "has not been profitable" (R. 110).

6. A rental increase to cover property taxes has since been allowed, conditional on the outcome of this litigation.

Force (R. 111). The lease was for a 75-year period; it is terminable for default at the option of the Government (Ex. 4, R. 132, 140).

The lease provides that the Air Force is to furnish fire protection and policing (Ex. 4, Par. 9, R. 137-138). The testimony shows that the Air Force also furnishes sewage and water service (R. 103-104, 110-111) and access roads (R. 110); the lessee maintains the roads within the leased property (R. 107, 110). The Base is not in a school district or municipality (R. 63; Ex. 1, R. 124). The record also shows that such documents as conditional sale contracts, mortgages and deeds for property are recorded with the Clerk of Sarpy County (R. 182, 189, 190B, 191, 192B, 193), but that he charges fees for those services (R. 117).

As contemplated by the lease, on April 1, 1951, petitioner executed a mortgage in the amount of almost $5,000,000 to the Manufacturers Trust Company of New York on its leasehold interest in the property (Ex. 15, R. 169-182, 101). The mortgage was insured by the FHA (R. 92).[7]

Petitioner was incorporated on a model charter form prescribed by FHA (R. 90, 70; Ex. 8, R. 147-156, 30) whereby FHA received the preferred stock of petitioner (R. 92; Ex. 14, R. 169, 89). This gave it voting control in certain circumstances, and the right to control the rentals charged (Ex. 8, R. 149-152; FHA Rules and Regulations, Sec. V, par. 4, Ex. 12, R. 161-162).

The apartments were then constructed, and were occupied entirely by military personnel and their dependents (R. 42). There was testimony that the buildings had a life expectancy of about 35 years (R. 108). They could (although not profitably for petitioner) be repaired and main-

7. This, of course, meant that there was no possibility that a default would result in the foreclosure of the Government's interest in the buildings, since any default would be made good by the FHA, which would then itself succeed to the right of the mortgagee.

tained to have a longevity beyond the term of the lease (R. 113).

Petitioner bought refrigerators, stoves, washing machines and dryers for the apartments, financing them by conditional sales contracts and chattel mortgages (Ex. 22-29, R. 190A-194, 116-117). These were owned by petitioner.

Since it had been assumed that the County could not lawfully tax the project (see p. 9, *supra*), petitioner did not list with the County Assessor of Sarpy County any property located on Offutt Air Force Base (R. 119-120). On June 23, 1952, the Assessor himself executed a purported "Business and Professional Schedule of Personal Property," which he claimed to be owned by petitioner and subject to taxation (R. 120; Ex. 5, R. 144 A, B, 29). The form is divided into parts for tangible and intangible property. Under part F, entitled "Furniture and Fixtures—Tools and Equipment", the Assessor listed office furnishings which he valued at $205, and household appliances, which he valued at $69,695. Under part I, the tangible property schedule, entitled "Improvements on Leased Land", the Assessor inserted the amount $755,785, which, the Assessor admitted, represented his "opinion as to the value of the buildings" (R. 121).[8] The total amount of $825,685 was entered opposite the classification of "Apartment Houses" in part J of the form, and also, under Item 135 as the "TOTAL TANGIBLE" assessment. Nothing was entered under parts K and L as intangible property (which, the form states, is subject "only to an intangible tax of 25¢ on every $100 valuation" for Class "A" intangible property and 80¢ per $100 on Class "B").[9]

8. The form of tax schedule states, under part I, that "you will enter the value of all improvements owned by the business which are not assessed and taxed as real estate." (Ex. 5, R. 144B). This obviously means physical improvements.

9. See Neb. R. R. S. 1943, §§ 77-702; 1953 Cum. Supp. §§ 77-703.

The Assessor executed a similar return for 1953, after completion of the project (R. 120-121, Ex. 6, R. 144C, 47) in which he valued the property at $2,778,580.

On the basis of the 1952 schedule the respondents levied taxes against petitioner in the amount of $10,783.45[10] (R. 47). Petitioner did not pay the taxes assessed (R. 15, 19), and the respondent County Treasurer threatened to cause a distress warrant to be issued to collect the taxes involved (Ex. 7, R. 145, 30).

Petitioner thereupon brought this suit in the District Court for Sarpy County for a declaration that Nebraska and Sarpy County were without power or authority to levy the taxes in question (R. 1-8). After trial the District Court ruled in petitioner's favor (R. 20-27). See also Appendix to Petition, pp. 5-18. In its opinion that court stated that "under the terms of the lease in question the actual legal title to the apartments, the dwelling units, the buildings themselves, is in the United States Government, exactly the same as it is on the land" (App. to Pet., p. 8), and that they were therefore "beyond the power of Sarpy County to tax as such." (*Id.* p. 10). The court made no "commitment as to whether there might be some taxable leasehold interest" which would be "the very most that Congress has given any consent to tax, if they have given any consent at all" (*Id.* p. 10). But the court concluded that "by no stretch of reasonable construction can the listing of improvements on leased property, or the listing of apartment houses, as was done" here, "be properly construed to be returning for taxation the value of a leasehold interest therein. It is attempting to tax the improvements themselves" (*Id.* p. 14). As to the appliances and office equipment, the court held that under *Surplus Trad-*

10. The rate of tax was much higher than the rates permitted on intangible property, as described in the form. The County does not suggest that the tax rate on intangibles was being applied.

ing Co. v. *Cook*, 281 U. S. 647, personal property on a military base over which the United States had exclusive jurisdiction could not be taxed, and that also they could not possibly be regarded as within any consent given by Congress to the taxation of leasehold interests (*Id.*, pp. 13-14).

The Supreme Court of Nebraska reversed (R. 194-214). It held that Congress had re-ceded to Nebraska the right to tax lessee's interest in the housing project, and that "plaintiff's interest in the housing units and fixtures as owner thereof was and is taxable as personal property, together with the value of plaintiff's lease" (R. 214).

SUMMARY OF ARGUMENT.

I.

A. The housing project is built on a military reservation over which the United States has exclusive jurisdiction. The states cannot tax property, even privately owned, located on such enclaves, absent the consent of Congress. *Surplus Trading Company* v. *Cook*, 281 U. S. 647 (1930). The fact that some of the land was donated to the United States is irrelevant.

B. The court below held that Congress had consented to local taxation in Section 6 of the Leasing Act of 1947, which authorizes taxation of the "lessee's interest" in properties leased under that statute. We submit, however, that there has been no waiver of the federal immunity for property located on enclaves over which the United States has exclusive jurisdiction.

1. When Congress means to waive jurisdiction over land already subject to exclusive federal authority, it does so in express terms. The 1949 Military Housing Act con-

tains no such express provision, and the only reference to the problem in its legislative history reflects an understanding that housing on federal reservations will not be taxable. Section 805, which authorizes leasing "under the authority of" the 1947 Act, does not manifest any intention to waive immunity on federal enclaves, or to incorporate any but the authorizing provision of that Act. The 1947 provision was meant to prevent private operators of leased industrial facilities not required for public use from having a tax advantage over their competitors. This reason is inapplicable to military housing, presently serving a public purpose and intended to furnish housing facilities at low rentals in areas where private facilities are inadequate.

2. Furthermore, Section 6 of the 1947 Act is shown by its history to have been intended to be declaratory of existing law, to insure that states already taxing leasehold interests could continue to do so, not to broaden the states' taxing authority. The discussion at the hearing in which the provision was drafted makes sense with respect to lessee's interests in land owned by the Government but not contained in any exclusive federal area, which had previously been taxable, but not as to federal enclaves where even private property was not locally taxable. To hold that the lessee's interests in such enclaves could be taxed would result in the anomalous situation of property owned by the federal government and leased to private persons being taxable while immediately adjacent property owned by private persons or leased to private persons would not be taxable. It is submitted that such an intention cannot be imputed to Congress, and that Section 6 was not intended to apply to areas over which the United States has exclusive jurisdiction.

II.

Even if the provision in Section 6 of the 1947 statute permitting taxation of the lessee's interest applies, it does not authorize the tax imposed here. For the tax here assessed was not upon a lessee's interest, but on the property itself. The assessor admitted that his assessment against the improvements was his "opinion as to the value of those buildings".

A. Although the court below seems to have held the contrary, the buildings were the property of the United States. The lease so provides. The Government has taken the principal financial risk in constructing the project, and it retains a large measure of control over the project's operations. It determines who may occupy the apartments, prescribes the maximum rents, and owns the controlling voting interest in petitioner, leaving petitioner little more than a paid managing agent. The Government's interest is substantially greater than that of the ordinary lessor-owner of property. There is thus no basis for respondents' contention that the lease gives the Government only a sham title, even if a reason for placing title to the buildings in the Government may have been to avoid local property taxes. *Cf. Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110. Furthermore, tax exemption serves a proper governmental purpose, since one of the objects of Congress in providing for the leasing of federally-owned sites for such projects was to "make possible the achievement of lower rentals for the personnel" (H. Rept. No. 854, 81st Cong., 1st Sess., p. 5), and local taxes would be passed on to the military subtenants (R. 43). Inasmuch as the federal government (or petitioner) and not the state or locality provides or pays for almost all of the governmental services—schools, fire, police, sewage, water, roads—there is no good reason why local property taxes should be paid.

B. This Court, and not the State court, has the final say both as to the meaning of contracts and leases to which the United States is a party and as to the characterization of a State tax affecting federal rights. Here, as in *United States* v. *Allegheny County*, 322 U. S. 174, a state assessed the full value of government-owned property against a private lessee of that property. In that case the Court held this to be an invalid tax on the property itself, not a tax on any lessee's interest. The same is true here.

C. As to the appliances assessed by the County, they are owned by the petitioner. They are not covered by any lease from the Government, and accordingly, are not reached by the provision in Section 6 authorizing the taxation of "the lessee's interest, made or created pursuant to the provisions of this Act". Their status is that of any private property on an exclusive federal enclave, without any waiver of the federal immunity. Such property may not be taxed by the states. *Surplus Trading Co.* v. *Cook*, 281 U. S. 647 (1930).

ARGUMENT.

I.

THE TAXES HERE IMPOSED ARE INVALID BECAUSE LEVIED ON PROPERTY IN AN AREA SUBJECT TO THE EXCLUSIVE JURISDICTION OF THE UNITED STATES.

A. The States Cannot Tax Property Located on Enclaves Over Which the United States Has Exclusive Jurisdiction.

The property assessed by respondents is all located on the Offutt Air Force Base. Nebraska has ceded, and the United States has taken pains to accept, exclusive jurisdiction over this area.

Absent the consent of Congress, the State and County have no more jurisdiction to tax property located on such an enclave than to reach property completely beyond their borders. "A State cannot legislate effectively concerning matters beyond her jurisdiction and within territory subject only to control by the United States." *Standard Oil Co. v. California*, 291 U. S. 242, 245 (1934). "Wherever the United States has such [exclusive] jurisdiction the State would have no authority to lay the tax." *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 140, 141 (1937). "The right of a State to tax realty directly depends primarily upon its territorial jurisdiction over the area. * * * Exclusive legislative power is in essence complete sovereignty. That is, not only is the federal property immune from taxation because of the supremacy of the Federal Government but state laws, not adopted directly or impliedly by the United States, are ineffective to tax or regulate other property or persons upon that enclave." *S. R. A., Inc.* v. *Minnesota*, 327 U. S. 558, 562-563 (1946).

Many cases, in addition to those just quoted, establish that State laws, including State tax laws, are inapplicable to land over which the United States has exclusive jurisdiction. Closely in point is *Surplus Trading Co.* v. *Cook*, 281 U. S. 647 (1930), in which blankets owned by a private corporation but located on such a military reservation were held not subject to the property taxes of the Arkansas county in which the reservation was located. *United States* v. *Unzeuta*, 281 U. S. 138 (1930), decided at the same term, held that Nebraska had no jurisdiction over a murder committed on a railroad right-of-way within the Fort Robinson military reservation. *Arlington Hotel Co.* v. *Fant*, 278 U. S. 439 (1929), held that State rules of liability for negligence were inapplicable to a hotel operated under lease from the United States in a national park over which Congress had exclusive jurisdiction. And *Benson* v. *United States*, 146 U. S. 325 (1892), holds that the United States had exclusive jurisdiction over a murder committed on farmland located on a military reservation.

Respondents assert that *Surplus Trading Co.* v. *Cook* is a "frail precedent from another era," and seek to imply that it is no longer authoritative (Br. in Opp., p. 10). But no subsequent case casts doubt upon that decision. On the contrary, the rule for which it and many other cases stand has since been recognized in *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 140 (1937), *Standard Oil Company* v. *California*, 291 U. S. 242, 244-245 (1934), *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, 529 (1938), *S. R. A., Inc.* v. *Minnesota*, 327 U. S. 558, 562 (1946), and *Howard* v. *Commissioners*, 344 U. S. 624, 627 (1953), in each of which the *Surplus Trading* case has been cited approvingly. See to the same effect *Pacific Coast Dairy* v. *California Department of Agriculture*, 318 U. S. 285, 294 (1934); *Johnson* v. *Yellow Cab Co.*, 321 U. S. 383, 385 (1944).

Respondents argued below (Br., p. 13), however, that

"private housing units although rented to military personnel are not 'Forts, Magazines, Arsenals, Dockyards and other needful Buildings,' " and therefore did not fall within the constitutional classification subject to exclusive Federal jurisdiction. This Court has held, however, that the constitutional provision is not limited to military structures, but extends to "whatever structures are found to be necessary in the performance of the functions of the Federal Government." *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 143 (1937); *Silas Mason Co.* v. *Tax Commission*, 302 U. S. 186, 203 (1937). It would seem plain, in any event, that housing quarters for military personnel are "needful buildings" for military purposes. Such buildings are no less necessary because built and operated by private lessees of the Government land, for reasons of Government fiscal economy, than are barracks or quarters provided directly by the Government itself.

Moreover, the cases establish not only that the States possess no jurisdiction over private, personal property on exclusive Federal enclaves, but also that the jurisdiction of the United States is exclusive even with respect to portions of the enclave not used for any Federal purpose. The lands involved in the *Unzeuta*, *Arlington Hotel* and *Benson* cases were used for private railroad, hotel and farming operations, and yet the states were held to possess no authority over them.

Respondents also argued below that since a part of the land on which petitioner's housing project is located was donated to the United States by the Omaha Chamber of Commerce and not bought, it is not covered by Article I, Section 8, Clause 17 of the Constitution, which provides for exclusive Congressional authority "over all places *purchased* by the consent of the legislature of the State * * * for the erection of Forts, Magazines, Arsenals, Dockyards and other needful Buildings." Many cases estab-

lish, however, that even if property is not acquired by purchase, when the State cedes jurisdiction to the United States, the latter's exclusive authority is limited only to the extent that the State act of cession contains an express limitation. In the *Unzeuta* case, which involved Nebraska, as does the case here, the Court said with respect to land which had not been purchased (281 U. S. 138 at 142):

> "* * * When, in such cases, a State cedes jurisdiction to the United States, the State may impose conditions which are not inconsistent with the carrying out of the purpose of the acquisition. *Fort Leavenworth Railroad Company* v. *Lowe, supra*; *Chicago, Rock Island & Pacific Railway Company* v. *McGlinn*, 114 U. S. 542; *Benson* v. *United States*, 146 U. S. 325, 330; *Palmer* v. *Barrett*, 162 U. S. 399, 403; *Arlington Hotel Company* v. *Fant*, 278 U. S. 439, 451. The terms of the cession, to the extent that they may lawfully be prescribed, determine the extent of the Federal jurisdiction.
>
> "In the present instance, there is no question of the status of the Fort Robinson Military Reservation. Nebraska ceded to the United States its entire jurisdiction over the reservation save in the matter of executing process and opening and repairing roads or highways."

See also *Surplus Trading Co.* v. *Cook*, 281 U. S. at 651; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 142.

Here Nebraska has not in any way relevant here limited the grant of exclusive jurisdiction to the United States. The *Unzeuta* case, which involved a similar cession by the State of Nebraska itself, should be decisive. Indeed, the Attorney General of Nebraska has on several occasions recognized that the State possesses no authority to tax property in such Federal enclaves.[11]

11. An opinion of July 8, 1941 (Reports of Attorney General of Nebraska, 1939-1942, p. 763), pertaining to the very installation involved here, reads in part:

"If this land was purchased with the consent of the Legis-

In any event, this Court has not construed the word "purchase" in the constitutional provision so strictly as

lature, the federal jurisdiction is exclusive of all state authority. If it was acquired otherwise than by purchase with consent, it may be said that the Legislature of Nebraska had the power to impose certain conditions when it ceded jurisdiction to the United States over the territory however, in the matter of ceding jurisdiction over Fort Crook, the Nebraska Legislature imposed no conditions except that the state retained concurrent jurisdiction for the service of civil and criminal process.

"So that whether the real estate was acquired by purchase with the consent of the Nebraska Legislature, or otherwise, in this particular instance the ultimate conclusion must be the same.

"It is our opinion that private personal property located within an army camp, such as Fort Crook, cannot be subject to state taxation."

In an opinion dated March 17, 1949, pertaining to personal property located at the United States Ordinance Plant in Saunders County, Nebraska, the Attorney General stated:

"We think it clear from the foregoing that as long as the acceptance of exclusive jurisdiction over this land by the United States Government remains the personal property of individuals located within the boundaries of the Ordnance Plant it is not taxable by the state or any subdivisions thereof. This immunity does not inhere in the property itself, it arises only because of its location on this particular land. The moment it is removed beyond the boundaries thereof, it immediately becomes subject to assessment and taxation." (Reports of Attorney General of Nebraska, 1949-1950, p. 147.)

The Attorney General's Opinion of April 11, 1952 (Reports of Attorney General, 1951-1952, p. 486) referred to by the court below (R. 204), assumed incorrectly (apparently upon the basis of a form of lease not used in this project) that the buildings leased belonged to the petitioner and would not become the property of the United States until the expiration of the lease. When the Air Force called his attention to the form of lease actually used on this project, the Attorney General admitted, in an opinion letter dated March 18, 1953 to Senator Vogel (not reported) that the opinion of April 11, 1952 "may have to be" changed, saying:

"The copy of the lease which was sent to us last April indicated that the improvements erected on the leased land would not become the property of the United States until the expiration of the lease in seventy-five years. The copy of the lease sent to us about a month ago [the lease actually used] states that the buildings are now the property of the United States.

to require a purchase for consideration in the commercial sense. It is not uncommon for local interests to donate property to the United States, in order to encourage the Government to establish a military base in the area, or for states to cede such land to the United States. Thus, the land involved in *Pacific Coast Dairy* v. *California Department of Agriculture*, 318 U. S. 285, 293 (1943), and also apparently in *Surplus Trading Co.* v. *Cook*, *supra* was donated to the United States.[12] In *Western Union Telegraph* v. *Chiles*, 214 U. S. 274 (1909), and *United States* v. *Tucker*, 122 Fed. 518 (W. D. Ky. 1903), a part of the land was ceded by the State. In each of these cases the Court treated the acquisition as a purchase covered by the constitutional provision, and in the *Pacific Coast Dairy* case flatly stated (p. 293), "Nothing turns, in our view, on the method of acquisition."

Since Nebraska has no jurisdiction over military reservations subject to the exclusive jurisdiction of the United States, it cannot, without the consent of Congress, impose taxes upon land, buildings or personal property on such reservations, whether such property is owned by the United States or private persons. In this case, this immunity would extend therefore not only to the buildings owned by the United States, but to the appliances and other equipment owned by petitioner and located on the same property.

. If the latter is true, the buildings themselves cannot be taxed because under the Enabling Act of April 19, 1864, the people of the State of Nebraska agreed, 'that no taxes shall be imposed by said state on lands or property therein belonging to or which may hereafter be purchased by the United States.' "

12. In the *Pacific Coast Dairy* case, the opinion recites (318 U. S. at 293) that Congress accepted the tract now called Moffett Field "without cost to the Government". In the *Surplus Trading Co.* case, the Attorney General of Arkansas stated (281 U. S. at 648):

> "The land was not actually purchased by the United States, but was donated by public-spirited citizens of Arkansas."

consent of Congress, property of the United States may not be taxed. And in their brief below (p. 17) they stated that "they do not contend that such consent has been given" to the taxation of property owned by the Government.[21] Their argument seems to be that the buildings do not actually belong to the Government, even though the lease so provides.

1. *The provisions of the lease.* Paragraph 11 of the lease in this case provides that (R. 138):

> "The buildings and improvements erected by the Lessee constituting the aforesaid housing project, shall be and become, as completed, real estate and part of the leased land, and public buildings of the United States, leased to Lessee. * * *"

and also that upon the termination of the lease,

> "* * * all improvements made upon the leased premises shall *remain* the property of the Government without compensation * * *."

These provisions clearly mean that the buildings and improvements are the property of the United States. The buildings, as completed, become "real estate and part of the leased land, and public buildings of the United States, leased to lessee". This obviously means that the buildings become the Government's real estate to the same extent as the land itself. Language could hardly be plainer. And the improvements could not "remain" the property of the Government upon termination of the lease if they had not previously been the Government's property.

The normal rule, of course, recognized in Nebraska as well as elsewhere, is that the intention of the parties determines whether buildings are owned by lessor or lessee.

21. The brief states: "The appellants [respondents here] admit that they cannot tax property of the Federal Government without its consent and they do not contend that such consent has been given." (p. 17)

B. Congress Has Not Waived the Immunity from State Taxation of Military Housing Projects on Areas Over Which the United States Has Exclusive Jurisdiction.

Congress may, of course, waive the immunity of property on Federal territory from State or local taxation or regulation. It has done so in various statutes. But when it waives such a Federal right, it does so explicitly and unequivocally, and with knowledge that that is what it is doing. Thus, in the Buck Act of October 9, 1940, 54 Stat. 1059, codified July 30, 1947, 61 Stat. 641, 4 U. S. C. §§ 104-110, Congress specifically authorized the states to impose sales, use and income taxes in "federal areas", and to impose gasoline taxes on "United States Military or other reservations". *Cf. Howard* v. *Commissioners*, 344 U. S. 624, 627-628. In contrast, the Public Salary Tax Act of April 12, 1939, 53 Stat. 575, 5 U. S. C., Section 84a, authorizing States to levy income taxes on Federal employees, had not in terms extended to those residing and working in Federal enclaves. In order to permit taxation in such areas, it was deemed necessary to use the explicit language of the Buck Act. See Senate Rept. No. 1625, 76th Cong., 3rd Sess., p. 3 (1940).

Other statutes which prove that when Congress wishes to subject to State authority persons or transactions on Federal enclaves it does so specifically are the Assimilated Crimes Act, 62 Stat. 683, 18 U. S. C. §§ 13, 7 (3) ("Any lands reserved or acquired for the use of the United States and under the exclusive or concurrent jurisdiction thereof"); Wrongful Death Act, 45 Stat. 54, 16 U. S. C. § 457 ("within a national park or other place subject to the exclusive jurisdiction of the United States"); Workmen's Compensation Act, 49 Stat. 1938, 40 U. S. C. § 290 (lands "owned or held by the United States of America by deed or act of cession").

Frost v. *Schinkel*, 121 Neb. 784, 238 N. W. 619, 77 A. L. R. 1381 (1931). Ordinarily "when a lessee of land erects a permanent building the lessor owns it". *Hebrew Home* v. *District of Columbia*, 142 F. 2d 573, 574 (C. A. D. C. 1944); *Kutter* v. *Smith*, 2 Wall. 491 (1864). Here that intention is manifested in the lease, which demonstrates that the parties intended that the buildings were to be owned by the lessor. Cf. *United States* v. *Ansonia Brass Co.*, 218 U. S. 452, 467 (1910). It is to be noted that both parties to the lease, petitioner and the United States, agree that this is what the lease means, and that this is what they intended.[22]

2. *The lease is controlling even if a purpose of its draftsmen was to prevent state taxation.* Respondents admitted below (Br., p. 17) that the lease on its face "purports to provide that the buildings as completed become the property of the United States". But they contended that this was "a sham and a fraud on appellants and that this court should give it no force and effect", since the provisions were inserted in the lease "for the sole and only purpose of trying to avoid taxation" (Br., p. 18). And the court below found that to conclude that petitioner was not "the owner of all the improvements * * * so long as his lease was in force and effect * * * would permit plaintiff to perpetrate a sham and fraud upon the State and its governmental subdivisions" (R. 210). The last observation suggests that petitioner was at fault in some way because title to the buildings was retained by the United States, and because of the framing of the contractual arrangement

22. The court below (R. 209) referred to a representation by the president of petitioner in an application for a loan from the Douglas County Bank that petitioner is the "owner" of the apartment buildings (Ex. 16, R. 182, 101-102). When asked about this, petitioner's president stated that the form had been prepared by the bank, and that he had not observed the words "owner of" until his attention was called to them in the court (R. 109). In any event, such a statement by petitioner to a third person cannot determine or affect the interest of the United States.

> Housing] Commissioner under this Title from taxation by any State or political subdivision thereof, to the same extent, according to its value, as other real property is taxed."

Since the Commissioner has not "acquired and held" the property involved in this case, Section 807 is not applicable here, as the court below conceded (R. 199). This section, like those on which it is modeled in other Titles of the Housing Act,[13] was designed to insure that ordinary private property which the Commissioner acquired on default in repayment of a Government loan would not go off the local tax rolls. It is applicable to Wherry Act housing built on private lands. But on its face it does not waive any immunities except those arising from "this Title". It does not affect property exempt from state taxation and never on the local tax rolls for other reasons, such as location on an exclusive Federal enclave.

The Section upon which the court below did rely for its decision was Section 805 of the Wherry Act (63 Stat. 570, 12 U. S. C. Section 1748(d) (before 1955 amendment)). That Section provided in pertinent part:

> "Whenever the Secretary of the Army, Navy, or Air Force determines that it is desirable to lease real property within the meaning of the Act of August 5, 1947 (61 Stat. 774), to effectuate the purposes of this title, the Secretary concerned is authorized to lease such property under the authority of said Act upon such terms and conditions as in his opinion will best serve the national interest without regard to the lim-

13. The Wherry Act was generally modeled on Title VI of the Housing Act, which provides for FHA mortgage insurance for private housing. S. Rept. 410, 81st Cong., 1st Sess., p. 5; H. Rept. 854, 81st Cong., 1st Sess., pp. 3, 5. Provisions identical with or similar to Section 807 are found in many Titles of the National Housing Act, all of which long antedated the Wherry Act, § 7, 55 Stat. 365, 12 U. S. C. § 1706b; § 208, 48 Stat. 1252, 12 U. S. C. 1714; § 307, 48 Stat. 1255, 12 U. S. C. § 1722; § 606, 55 Stat. 61, 12 U. S. C. 1741.

> itations imposed by said Act in respect to the term or duration of the lease, and the power vested in the Secretary of the Department concerned to revoke any lease made pursuant to said Act in the event of a national emergency declared by the President shall not apply."

Certainly the bare reference in the above sentence of Section 805 of the Wherry Act to the 1947 statute was not a plain or clear manifestation of Congressional intent that the Federal immunity from State taxation be waived for leased property on exclusive Federal enclaves. The authorization to the Secretary to lease "under the authority of said [1947] Act" can reasonably be read as incorporating by reference only the provision in Section 1 of the 1947 Act, which authorizes the leasing of:

> "such real or personal property under the control of his Department as is not surplus to the needs of the Department within the meaning of the Act of October 3, 1944 (58 Stat. 765), and is not for the time required for public use, to such lessee or lessees and upon such terms and conditions as in his judgment will promote the national defense or will be in the public interest."

Nothing in the history of the 1949 Act suggests that there was any purpose to incorporate anything but the authorizing provision in the 1947 statute,[14] or to grant any waiver of immunity beyond that provided in Section 807. In particular, there is no suggestion that Section 6 as well as Section 1 was being carried over and made applicable to

14. The only direct references to the States' right to tax is the statement in the Hearings referred to at p. 24, *supra*, which strongly suggests that projects on military reservations would not be taxable. The Committee Reports (S. Rept. 410, 81st Cong., 1st Sess.; H. Rept. 854, 81st Cong., 1st Sess.) threw light on this problem only through their general statements of the reasons underlying the statute (see pp. 3-4, *supra*), including the references to the importance and desirability of rentals which would be low enough for the lower grades of military personnel (see pp. 4, 43). The debates in Congress deal only with the basic purpose of the legislation. (95 Cong. Rec. 6537, 9679-9684 (1949).)

in a manner which might preclude the imposition of State and local property taxes. As the record demonstrates, however, the lease as well as the other documents—including even petitioner's Articles of Incorporation—were prepared on government forms which had been drafted in the offices of the Department of the Air Force.[23] Petitioner thus had no choice as to the form of the contracts into which it was entering.

In any event, the fact that a reason for employing the language found in paragraph 11 of the present form lease may have been to make it clear that the improvements were not to be taxable by local bodies does not mean that the provision of the lease is not to be given its full legal effect. The parties have a right to contract that title to buildings shall vest in the lessor.

The Court treated as irrelevant a similar argument, advanced in *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110 (1954), that the form of the cost-plus contract there involved should be disregarded because it had been adopted to escape the Court's decision in *Alabama* v. *King & Boozer*, 314 U. S. 1 (1941). The Court there assumed that this was true (p. 116), but concluded that (pp. 122-123):

> "* * * the form of contracts, when governmental immunity is not waived by Congress, may determine the effect of state taxation on federal agencies, for decisions consistently prohibit taxes levied on the property or purchases of the Government itself."

3. *Non-taxability serves a proper government purpose.*

23. This form differs in its provision for government ownership of the buildings from one used for a short time by the Department of the Army, which vested title to the buildings in the lessee, rather than in the Government. This was the form of lease involved in *Meade Heights, Inc.* v. *State Tax Commission of Maryland*, 202 Md. 20, 95 A. 2d 280 (1953), and *Conley Housing Corp.* v. *Coleman*, 211 Ga. 835, 89 S. E. 2d 482 (1955). Since those decisions do not hold that lessees may be taxed on the value of buildings *owned by the Government*, they are not in point here.

military housing. There could have been no intention to include the intermediate Sections 2, 3, 4 and 5 of the 1947 Act within the incorporation by reference, since they had no relation and could not be applied to the leasing of land for military housing.[15] It was not likely that Congress in 1947 would have realized that the reference to the power to lease under "the authority of said Act" would have included Section 6, but not Sections 2, 3, 4 and 5.

It is significant that the considerations which caused Congress to permit taxing the lessee's interest in leased properties in 1947 did not apply to the 1949 Military Housing Act.[16] The 1947 Act was concerned with Federally-owned industrial facilities, "not for the time required for public use," which were to be used by private business organizations. The 1949 Act, on the other hand, required as a prerequisite to approval of any housing project a certification of present public need that "the housing with respect to which the mortgage is made is necessary to provide adequate housing for such personnel." The reasons why Congress would not have wished properties not required for any Federal use to have been wholly tax exempt obviously do not apply to housing projects presently serving an important governmental purpose. During the hearing at

15. Section 2 repeals an earlier statute authorizing leasing. Sections 3 and 4 relate to the transfer of plants or facilities by the R. F. C. to the Defense Department. Section 5 empowers the Secretaries to impose conditions to insure the continued availability of property sold under the Surplus Property Act.

16. District Judge Forman and the dissenting Circuit Judge in the *Fort Dix* cases both considered that:

> "the reason for the reference in the 1949 legislation to the 1947 legislation was to define the types of property which the Secretaries could use for the purpose of the Military Housing Insurance Act and that was such property as was described in the 1947 legislation as was 'under the control of his Department within the meaning of the Act of October 3, 1944 (58 Stat. 765), and is not for the time required for public use. * * *.'" *Fort Dix Apartments Corp.* v. *Borough of Wrightstown*, 125 F. Supp. 743, 751, 225 F. 2d 473, 476.

which what is now Section 6 of the 1947 Act was suggested and drafted (see pp. 29-31, *infra*), the Senators expressed concern that the private operators of the leased plants should not have a tax advantage over their competitors who paid local property taxes.[17] But here the object is not to put the lessees on a par with competitive private enterprise, taxwise as well as otherwise, but to provide military personnel with housing at low rentals in areas in which private enterprise had not been able to provide adequate facilities. The purpose was to furnish housing as inexpensively as possible.

Under the 1947 Act, the industrial lessees were not selling to persons in whose living costs the Government had a special, as well as a pecuniary, interest of its own, but in the same commercial markets as other private competitors. Under the 1949 Act, the contrary was true, since the effectiveness as well as the cost of the military establishment depends in considerable part on the reenlistment rate of military personnel—which in turn depends on the adequacy and cost of housing facilities as a principal factor. Since Congress' reasons for waiving the Federal immunity for leased industrial facilities have no application to the military housing, it is not reasonable to assume, in the absence of clear language requiring such a result, that Congress in the 1949 Act intended to make the provision for local taxation in Section 6 of the 1947 Leasing Act applicable to such housing. Certainly the relationship between the two statutes is not sufficient to manifest the clear expression of legislative intention essential to a waiver of the immunity from local taxation for property located on exclusive Federal enclaves.

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17. Hearings before the Senate Committee on Armed Services on S. 1198 (H. R. 3471), 80th Cong., 1st Sess., a Bill to Authorize Leases of Real or Personal Property by the War and Navy Departments, pp. 30-32.

2. Even if Section 6 of the 1947 Leasing Act Be Deemed Incorporated in the Wherry Act, It Does Not Apply to Property on Exclusive Federal Enclaves.

Moreover, even if it be assumed that Section 6 of the 1947 Act was made applicable to leases under the 1949 statute, we submit that the provision in the 1947 Act was not meant to apply to property over which the State had no territorial jurisdiction. This appears plainly from the history of Section 6.

The first sentence of Section 6 was not found in the bill as it was reported to the House and submitted to the Senate Committee. Under Secretary of War Royall and Assistant Secretary of the Navy Kenney, appearing before that Committee, were questioned by Senator Byrd as to whether the leased plants would be taxable. (Hearing before the Senate Committee on Armed Services on S. 1198 (H. R. 3471), 80th Cong., 1st Sess., a Bill to Authorize Leases of Real or Personal Property by the War and Navy Departments, p. 27.). There was general agreement that the lessees should be taxed, like their competitors (pp. 27-28). Senator Baldwin suggested an amendment (p. 28) providing that:

> "Property leased to private persons, corporate or individual, pursuant to the provisions of this act, shall be subject to State and local taxation in accordance with such State and local law."

He himself questioned, however, whether the fee remaining in the Government could be taxed, although he believed that:

> "* * * they could certainly tax personal property in the plant, the machinery and things that might be used in connection with it." (p. 28.)

Senator Tydings replied, "Not unless title was in the lessee" (p. 29). When Senator Baldwin made another proposal (p. 30) that:

"A lease of real property or personal property for a term of one or more years shall for the purposes of taxation alone be deemed to transfer a title in fee simple for the purpose of the lease",

Senator Tydings again replied:

"To get down to constitutional law, you would be taxing a man on property he did not own, and I am afraid it would not hold water. The mere fact we pass a law saying you shall consider he owns it does not make him own it, and you cannot tax a man for property he does not own."

Secretary Royall pointed out that "California and one or two other states now tax the possessor of the interest in docks, and so forth, leased from the Government", and stated that he thought the "possessory interest tax" to be constitutional (p. 31). Secretary Kenney then stated that the local authorities could "make the leasehold interest itself taxable, which I think should be all that could be taxable."

Senator Tydings agreed, "That is right. Say the lease was for 5 years. You could take up the value of the lease, which would be an infinitesimal part of the value of the property."

The colloquy then continued (pp. 31-32):

"Senator Tydings. As a matter of fact, if the Government leases to corporation AB a plant for a period of 5 years without us doing anything about it, they would be taxable by each community in America that taxes leasehold property. So why should we put anything in?

"Mr. Kennedy. I do not think you should put anything in this bill.

"Senator Tydings. That is what I am getting at.

"Mr. Royall. I do not see any objection to putting it in there if there is any question about it. You had some language here that the possessor of the lease-

hold interest pursuant to this act may be subject to local or State taxation. That would help.

"Senator Tydings. Upon the lessee?

"Mr. Royall. That is right.

"The Chairman. Have you got the wording in shape now so you can read it off in full?

"Mr. Royall. This does not read very smoothly. I think we can straighten it out.

"Senator Tydyings. How would it be to say that the lessee's interest in property may be subject to tax by local authority?

"Mr. Kenney. Any interest of the lessee created pursuant to the provisions of this act may be subject to local taxation.

"The Chairman. Read it off in full, Mr. Secretary.

"Mr. Royall (reading): The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation.

"The Chairman. Is that satisfactory? All right."

The sentence thus agreed on in the Committee was *in haec verba* included in the statute as it was finally passed.

There was thus general agreement that the States could tax leasehold interests if their own law so permitted,[18] and that the purpose of adding the first sentence to Section 6 was to remove any question as to that with respect to the defense plants. Senator Baldwin's earlier suggestion, which might have permitted the whole value of the property to be taxed, was rejected because of doubts as to whether it was proper or constitutional to tax private persons for property interests still remaining in the Government.

The above discussion by those who agreed upon the language in the statute makes sense only if they were speaking of Government-owned property leased to private per-

18. Accord: *Jetton* v. *University of the South*, 208 U. S. 489 (1908).

stances. They do not suggest that a more stringent rule is to be applied to the Government than to private persons, as would be necessary if the Government as lessor were held not to be the owner.

5. *The state and locality do not provide the services for which local taxes are primarily collected.* The court below seems to have believed that it would be inequitable for the housing project and its occupants not to pay taxes to Sarpy County. But this is not a case in which a state or locality which provides governmental services to an enterprise is being deprived of the revenues needed to pay for such services. On the contrary, since Nebraska and Sarpy County do not provide such services on Offutt Air Force Base,[25] they would receive a windfall if allowed to levy substantial taxes on the military housing project. The housing project is not in a Nebraska school district (R. 63, 124), which means that Nebraska does not use tax money to pay for schooling for military dependents. Schools for Air Force dependents are paid for by the United States.[26] As has been indicated (p. 10, *supra*), the Air Force provides access roads, fire and safety (police) protection, sewage and water service, which, with schools, are the principal items for which local governments collect taxes. Petitioner itself provides roads within the project (R. 110).

25. We are advised by the Department of the Air Force that this is generally true as to military bases over which the United States has exclusive jurisdiction.

26. The Acts of September 23, 1950, 64 Stat. 967, and September 30, 1950, 64 Stat. 1100, as amended, 20 U. S. C. §§ 236-244, 251-280, provide for federal aid in the construction and operation of schools in areas affected by federal activities. We are advised that the Commissioner of Education has made arrangements under these statutes to pay for the education of children of Offutt Air Base personnel. See Annual Reports of the Commissioner of Education to Congress on the Administration of Public Laws 874 and 815, with respect to payments to the City of Bellevue, Nebraska, which adjoins Offutt Air Base. 1954 Report, pp. 65, 138; 1953 Report, pp. 59, 123; 1952 Report, pp. 52, 103; 1951 Report, pp. 28, 57.

sons in territory subject to state jurisdiction, not property in a Federal enclave. For if it were in territory subject to exclusive Federal jurisdiction, the lessee's interest would not have been taxable without the express consent of Congress. As it was finally agreed upon, the proposed amendment was designed to be declaratory of the States' right, to remove doubts as to the taxability of the lessee's interest, not to permit taxation of what could not have been taxed before. Not only was there no mention of an intention to waive jurisdiction over property on an exclusive Federal enclave; the entire discussion is consistent only with the contrary assumption that it was a property interest, not the Government's territorial jurisdiction, as to which a possible immunity was being waived.

The subsequent history of the provision is very brief. The Senate Committee Report (No. 626, 80th Cong., 1st Sess., p. 3) merely paraphrased the statutory provision.[19] On the floor of the Senate, the only comment was contained in Senator Baldwin's general explanation of the bill. As to Section 6, he said (93 Cong. Rec. 9798):

> "Section 6 expressly provides that the lessee's interest in property leased under the bill may be the subject to taxation by State or local authorities. It further provides that should such leased property itself be subsequently rendered taxable by State or local governments through any future action of Congress, any lease made under the authority of the bill shall be subject to reopening. This provision was inserted in order to prevent a lease from the Government being made a vehicle for tax avoidance."

19. "Section 6 provides that the interest a lessee holds under this act shall be subject to State or local taxes. In the event of States not presently having legislation permitting the taxing of such property, enacting such laws subsequent to the negotiation of a lease under this act, this section provides that the lease can be renegotiated.".

The last sentence does not accurately summarize the second sentence of Section 6, which provides for renegotiation if Congress, not the State, authorizes taxation of the property.

The first two sentences are of significance here because of the contrasting ways in which they refer to the permitted tax on the "lessee's interest" and to the right to readjust if "such leased *property itself* be subsequently rendered taxable" through future action of Congress. This shows an understanding that Congress regarded the property itself as something more than and different from the lessee's interest. The last sentence, which states that Section 6 was intended to prevent a lease from the Government "being made a vehicle for tax avoidance" is also important. For it presupposes a liability to tax apart from the lease, or there would be no tax to avoid. But as to property on an exclusive Federal enclave, there would be no such liability, even for property entirely privately owned. Thus, it seems plain that Senator Baldwin did not have any such property in mind.

In the House debate the subject was referred to only in one brief and incorrect sentence spoken by Representative Shafer, a member of the Committee. He declared (93 Cong. Rec. 10,492):

> "I may add to the gentleman's statement that the lease also provides that the property shall be subject to State and local taxation and in order that unfair competition may be prevented for anything manufactured in these plants by private industry."

This shorthand summarization of Section 6, which presumably meant "statute" rather than "lease", is broadly accurate if it be read as meaning that some State and local taxation was being permitted to prevent unfair competition with other manufacturers—which was probably all that the Representative intended to say. A literal reading of the sentence as indicating an intent to permit local taxation of the properties as such, as distinct from the lessee's interest in them, is inconsistent with the language of Section 6 and with all other explanations of it.

Here, again, we point out that, even if the Court concludes that the intention of Congress does not show as plainly as we think it does that there is no intention to waive immunity for Federal enclaves, as distinct from property over which the United States has title, certainly there is no affirmative evidence of an intention to permit local taxation of areas subject to exclusive Federal jurisdiction. This is true not only with respect to the incorporation by reference of the 1947 statute in the 1949 Wherry Act, but also as to the 1947 Act viewed alone. An intent on the part of Congress to waive its immunity must be clearly demonstrated. The consent is to be construed "with the strictness appropriate to the interpretation of a waiver of a defined tax immunity of the sovereign." *Oklahoma* v. *Barnsdall Refineries*, 296 U. S. 521, 526 (1936); *Austin* v. *The Aldermen*, 7 Wall. 694, 699 (1868).

That the statutory provisions involved in the Housing Act and the Leasing Act were designed to deal with ordinary situations involving Federally-*owned* property where no question of exclusive jurisdiction could arise also appears from the peculiar situation which would result from a contrary holding. Let us assume that on the Federal enclave, right next to the apartment buildings here sought to be taxed, were:

(1) Facilities on the leased premises erected and owned by utility companies, as permitted by paragraph 11 of the lease (pp. 7-8, *supra*);

(2) A Government-owned building allotted to Air Force personnel, but in which they owned the refrigerators, stoves and other appliances; and

(3) A building occupied by a contractor making equipment for aircraft, but containing the contractor's own expensive machinery and also machinery leased by him from, but still belonging to, General Motors Corporation.

None of such privately owned property on the Federal enclave would be subject to State taxation. See cases cited pp. 17-18, *supra*. And no statute waives the Federal immunity as to such property. If Section 6 of the 1947 Leasing Act is construed as applying to exclusive enclaves, and not merely to Government-owned property not located on such enclaves, we would have the anomalous situation of property owned by the Federal Government and leased to private persons being subjected to tax, while property located immediately adjacent which is owned by private persons or leased to private persons is not subject to taxation.

Certainly if Congress had intended to deal with the broad question of recession of certain tax jurisdiction in Federal areas to the States, it would not have done so by giving the States power to tax Government property or a lessee's interest in Government property, while denying to the States the right to tax the property of private individuals.

To hold that a waiver was intended here, it is necessary to assume that Congress was aware that its reference in the 1949 Act to the 1947 statute for purposes of authorization included Section 6 of the latter Act, and also that that section applied to exclusive Federal enclaves. It cannot be said that the intention of Congress to authorize a waiver of the Federal immunity has been clearly expressed when the waiver can be supported only by attributing both of these questionable assumptions to Congress, particularly when this will produce the absurd results just described. It is submitted that such an intention cannot be imputed to Congress, and that the only proper conclusion to be drawn is that the Wherry Act does not contain any waiver of immunity from State taxation for projects on areas over which the United States has exclusive jurisdiction.

II.

THE TAX HERE WAS NOT AUTHORIZED BY SECTION 6 OF THE 1947 LEASING ACT, IF THAT SECTION IS APPLICABLE, SINCE IT WAS NOT IMPOSED UPON THE "LESSEE'S INTEREST" IN THE LEASED PROPERTY BUT UPON THE PROPERTY ITSELF.

Even if it be assumed, contrary to the argument in Point I, that Section 6 of the 1947 Leasing Act applies to property on exclusive Federal enclaves, the tax imposed here was unlawful. For that section provides that only:

> "The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation." (5 U. S. C. § 626s-6.)

Here the tax was assessed not on "the lessee's interest" in the housing project, but on the buildings themselves, which are a part of the real estate belonging to the United States. Buildings owned by the United States are exempt from local taxation whether or not they are located on land subject to exclusive Federal jurisdiction. *Van Brocklin* v. *Tennessee*, 117 U. S. 151 (1886); *United States* v. *Allegheny County*, 322 U. S. 174, 176-7 (1944); *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110, 123 (1954).

As has been pointed out, the provision of the 1947 Leasing Act, stating that the lessee's interest was subject to State taxation, was thought by its authors to be declaratory of existing law. This was correct, insofar as exempt property not on exclusive enclaves is concerned. The immunity of an owner of property does not extend to the interest of a non-exempt lessee. *Jetton* v. *University of the South*, 208 U. S. 489 (1908); Annotation, 23 A. L. R. 248 (1922). But the power of a State to tax is limited to the non-exempt lessee's interest. Power to tax that interest does not mean that the interest of the immune Government may be reached. And the Government's prop-

erty interest may not be defeated by requiring the lessee to pay the tax on the Government's interest as well as his own. *United States* v. *Allegheny County*, 322 U. S. 174, discussed *infra*, pp. 50-53.

The error in the decision below is that it permitted the Government's property, not merely the lessee's interest, to be taxed. The court sought to justify this result primarily on the ground that the lessee and not the Government was the real owner of the buildings, that the Government's title was only a sham. The court could not have upheld the tax on any other theory, for the Nebraska statute upon which it relied to authorize the tax as a matter of state law only permits "improvements put on leased public lands [to] be assessed to the *owner* of said improvements".[20]

We shall show:

A. That the United States and not petitioner is the owner of the buildings; and

B. That the tax here was imposed upon the Government-owned buildings, and not upon the "lessee's interest" therein.

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20. Section 77-1209, R. R. S. Nebraska 1943, the section under which the Nebraska Supreme Court found the assessment sustainable, reads:

"All improvements put on leased public lands shall be assessed to *the owner* of such improvements as personal property, together with the lease, and listed and assessed as such in the place where the land is situated. The taxes imposed on such improvements shall be collected by levy and sale of the interest of *such owner*, the same as in all other cases of collection of taxes on personal property, or by suit in the name of the county against *such owner*." (Emphasis supplied.)

Prior to this case, no Nebraska decision had ever suggested that the phrase "leased public lands" in the above statute included Federal military reservations. Petitioner argued to the contrary in the court below, but recognizes that the interpretation of the Nebraska statute does not present an issue upon which this Court can overrule the Nebraska Supreme Court.

On these questions this court is not bound by the decision of the Nebraska Supreme Court. For this Court has the final say "in determining the meaning and effect of contracts to which the United States is a party" (*S. R. A., Inc.* v. *Minnesota*, 327 U. S. 558, 564; *United States* v. *Allegheny County*, 322 U. S. 174, 183; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110, 121, and cases cited), and the lease is such a contract. Furthermore, this Court is not bound by a State court's characterization of a tax or its decision as to the incidence of the tax. "Where a federal right is concerned we are not bound by the characterization given to a state tax by the state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted." *Society for Savings* v. *Bowers*, 349 U. S. 143, 151 (1955); *Carpenter* v. *Shaw*, 280 U. S. 363, 367-68 (1930); *United States* v. *Allegheny County*, 322 U. S. 174, 184.

A. The Buildings Are Owned by the United States.

The District Court for Sarpy County stated (App. to Pet. p. 8):

> "Under the terms of the lease in question the actual legal title to the apartments, the dwelling units, the buildings themselves, is in the United States Government, exactly the same as it is on the land, so that as far as taxing the apartment houses, the buildings themselves, that would be directly taxing United States Government property. * * *"

(p. 10):

> "With reference to the apartment houses, the buildings, the physical improvements themselves, it seems to me that definitely they are property of the United States Government, and are beyond the power of Sarpy County to tax as such."

Respondents, of course, have not denied that, absent the

Here, moreover, retention of title in the United States and the drafting of the lease in a manner which it was believed would avoid state taxation served proper governmental and public interests, and was in no sense a "sham". In the first place, the purpose of the statute creating the rental housing program was to provide decent housing at modest cost to military personnel. The objective was not to give servicemen advantages for their own sakes, but in order to counter the great difficulty in keeping skilled trained men in the military services.[24] A high turnover decreases the effectiveness of the armed forces. Furthermore, the training of new personnel is extremely costly to the Government, particularly as military activity becomes more technical and scientific. It was estimated that adequate housing would cause 20% more of the Air Force to reenlist (sse note 1, p. 3). General LeMay testified at the Hearings on the 1955 Housing Amendments (see pp. 5-6) (Hearings before a Subcommittee of the Senate Committee on Banking and Currency, 84th Cong., 1st Sess., on the Housing Act of 1955, p. 480):

> "In our surveys throughout Strategic Air Command we have determined that there are five factors which influence retainability of an individual in the Air Force. These are pay, commissary privileges, post-exchange privileges, medical care, and housing. Our surveys further have indicated that housing has a greater influence upon retainability than any of the other four."

An important reason for using Government property for military housing has been to reduce the rentals which must be charged. The House and Senate Reports on the Wherry Act show the Congressional concern with the costs of the military housing to the lower grades of personnel. See p.

24. See the testimony of Col. Beck as to the importance of adequate housing to the retention of skilled Air Force personnel, as well as to morale and efficiency (R. 43-45).

4, *supra*. The Committee Reports recite that the leasing of Government-owned property was authorized not only to provide suitable sites, but also because "The leasing of such sites by the Military Establishment at nominal considerations would further make possible the achievement of lower rentals for the personnel of the establishment" (H. Rept. No. 854, 81st Cong., 1st Sess., p. 5), and "make possible rentals within the financial reach of a larger number of prospective tenants" (S. Rept. No. 410, 81st Cong., 1st Sess., p. 8).

A number of provisions of the statute manifest this purpose. The statute limits the investment per dwelling unit to $9,000 and the insured loan thereon to $8,100. Section 803(b)(3). By insuring the mortgage, the Government enabled financing to be obtained more cheaply, which meant that the amortization cost ultimately chargeable to the tenants would be less. Section 803(b)(3) limits the interest rate to 4%. The statute further provides that the FHA may regulate the mortgagor "as to rents or sales, charges, capital structure, rate of return, and methods of operation" (§ 803(b)(1)). In fact, maximum rents have been established by the FHA and Air Force working in collaboration, and the military are interested "in keeping the rents as low as possible" (R. 93). No rental increases may be made without their consent. See p. 8, *supra*.

4. *The Government Retained an Interest in the Property Greater Than That of Ordinary Lessors Whose Ownership is Universally Recognized.* It is clear that the Government retains an interest in the project immeasurably greater than that of the ordinary lessor in the enterprise conducted by his lessee. The Government here took most of the financial risk by insuring the mortgage. It determined who could occupy the apartments. It prescribed the maximum rentals. It owned the controlling voting interest in the petitioner. It provided most of the

necessary governmental services. (See pp. 8-10, 46-47.) Thus a large part, and indeed the most important parts, of the bundle of rights which is normally vested in the owner of a building remained with the Government. The petitioner-lessee is in substance little more than the manager of the project, with the right to whatever profits the Government deems reasonable. His practical position is little different from that of a managing agent. If an ordinary lessor can still be the owner of the buildings on leased property, as is usually the case, *a fortiori* the Government must be held to be the owner here, particularly in the light of the paragraph of the lease which so provides expressly.

The court below apparently thought that because the Government received only a nominal rental of $100, its interest in the property was only nominal (R. 209). But this ignores all of the other aspects of the transaction. A nominal rental was charged in order to serve the governmental purpose of providing housing for military personnel at the lowest possible cost. Such a nominal rental could be charged because the Government made sure that the property would be managed so as to accomplish this purpose by retaining control over the scale of rentals charged and the identity of the sub-tenants. These, of course, are customarily among the important rights over which the lessee of property has unrestrained control. Clearly the Government's interest in the property is *more* substantial than that of the ordinary lessor, despite the nominal rental. And yet property owned by such lessors is not taxable to the lessees.

The court below referred to the fact that the lease was for a 75-year term, and to testimony that the buildings could not be operated profitably by petitioner for more than about 35 years. This would not prove that the Government does not own the buildings, when the lease provides that it does. Nor does this mean that the buildings

will only stand for 75 years, or that they will never be operated by the Government. Judicially noticeable facts as to "temporary" buildings in parts of the District of Columbia shows that the Government maintains and operates buildings long after the originally anticipated life expectancy. But in any event, the facts referred to in the preceding pages demonstrate that during the pendency of the lease the Government has a substantial interest in the apartment buildings, much more than that of the ordinary private lessor of similar property.

The court below and respondents have relied upon such cases as *S. R. A., Inc.* v. *Minnesota*, 327 U. S. 558 (1946), *New Brunswick* v. *United States*, 276 U. S. 547 (1928), and *Baltimore Shipbuilding Co.* v. *Baltimore*, 195 U. S. 375 (1904). In the first two of these cases the Government had sold land and retained only a security interest, similar to a mortgagee's, in case the purchaser defaulted. The Court pointed out that (327 U. S. at 570, 276 U. S. at 555):

> "'In equity the situation was then the same as if the Corporation had conveyed title to the purchasers, as owners, and they had mortgaged the lots to the Corporation to secure the unpaid purchase money'."

In the *Baltimore* case the Government conveyed the land, subject only to the condition subsequent that the property revert to the United States if it ceased to be used as a dry dock. In the last case, the Government did not possess title at all, and in the first two, its legal title was a bare security interest.

In similar transactions between private persons, the buyers, not the sellers, would be regarded as the owners for tax purposes. The contrary is true as to lessors, even when they do not retain the substantive control and interest that the Government does here. Those cases properly hold that the Government's security title is no more substantive than a private person's in identical circum-

These are the principal items for which local taxes are collected. The respondents have asserted in their brief in opposition that documents are recorded with the County Clerk, that occupants of the apartments use the county courts, and the services of the County Treasurer's Offices for obtaining automobile licenses, and that the county provides police protection when they are off the base. The record is silent as to these matters, except for the recording. This Court has declared that "recording may not be made the occasion for taxing the Government's property". *United States* v. *Allegheny County*, 322 U. S. 174, 183 (1944). But, in any event, the services of the County Clerk and Treasurer are performed for fees. Automobile licenses are paid for. The police protection provided off the base is the same as that accorded to other non-residents while they are in the county, such as citizens of Iowa living only two miles away across the state line. The other services referred to are relatively inexpensive. Under the Buck Act (4 U. S. C. §§ 104-110), residents of military reservations must pay state sales,[27] use, income and gasoline taxes, which should amply compensate for the few inexpensive services which the state and locality can be said to provide.

27. The Florida cases relied on by respondents involve sales taxes, which the Buck Act permits to be imposed in federal areas. *Gay* v. *Jemison*, 52 So. 2d 137 (Fla. 1951); *Tampa Bay Garden Apartments* v. *Gay*, 55 So. 2d 739 (Fla. 1951). Since there was clearly no federal impediment to the state tax, the *Jemison* case was concerned with the construction of a Florida statutory exemption for sales of property to become part of a federally owned project. In holding that the project was not federally owned, the Florida court made no reference to the provisions of the lease or other factors discussed in this brief. The *Tampa Bay* case erroneously concluded that the project had no connection with a federal purpose, that, therefore, the United States Constitution did not authorize exclusive federal jurisdiction, and that the Florida cession statute did not cede such jurisdiction.

The other cases referred to by the court below held only that the taxes involved were authorized by the Buck Act. *Davis* v. *Howard*, 306 Ky. 149, 206 S. W. 2d 467 (1947); *Kiker* v. *Philadelphia*, 346 Pa. 624, 31 A. 2d 289, certiorari denied 320 U. S. 741 (1943).

To require the military personnel to pay taxes for services which the State and local governments do not furnish them would be to create an inequity, not to abolish one. Furthermore, as the District Court for Sarpy County observed (App. to Pet. pp. 15-16):

> "* * * I am only happy for Sarpy County that it isn't a matter where they have had this item of valuation on the tax books for two or three million dollars for the last ten years and would now be losing it from the tax rolls. This is something you never had on the tax books before; certainly it isn't representing the character of loss as if you had it on the tax books and found that it was deeded to a charitable or educational institution out from under you and you would lose that much valuation."

The above analysis shows that the United States is the owner of the apartment buildings both on the face of the controlling contract and as a matter of governmental and economic substance. On no theory can it be said that Congress has consented to the taxation of Government-owned property, as respondents admitted below (Br., p. 17). This should be sufficient to dispose of the case insofar as the taxes on the Government-owned buildings are concerned.

B. The Assessment Here Was Upon the Government's Buildings, Not Upon a Lessee's Interest in Them.

We have shown that the buildings belonged to the United States. The most that Sarpy County could tax, assuming Section 6 of the 1947 Act to be applicable, was petitioner's interest in the buildings as lessee, not the property itself.

Section 6 clearly differentiates between the "lessee's interest" and the property itself. The first sentence of the Section permits the "lessee's interest" to be taxed. The second sentence[28] refers to the "property" and pro-

28. "Any lease of property authorized under the provisions of this Act shall contain a provision that if and to the extent that

vides for renegotiation of the lease if Congress subsequently permits taxation of "such property". Furthermore, the legislative history summarized at pp. 29-31, *supra*, shows that Senator Baldwin's proposals to allow taxation of the leased property itself were rejected by the Committee, on the ground that it would be improper to tax the lessee on the property owned by the Government. He himself recognized the distinction between taxing the property and the lessee's interest in his subsequent statement on the Senate floor. See pp. 32-33, *supra*.

The tax here was assessed not upon a "lessee's interest" in the buildings and appliances but against the property itself. That is what the Assessor said he was evaluating (R. 121). Insofar as the buildings were concerned, he merely looked at them from the outside, and checked the County Clerk's mortgage records "and things like that" (R. 122). The amount he inserted in the assessment form under "Improvements On Leased Land" was, he admitted, his "opinion as to the value of those buildings" (R. 121). This was included in the portion of the form for "Tangible" property (R. 144A).

The District Court for Sarpy County held that in view of these facts, there was no need to determine whether a leasehold interest was taxable[29]. For, the court concluded (App. to Pet., p. 14):

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such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated" (Appendix, *infra*, p. 68).

29. "Whether that is an item of property that the Nebraska statutes contemplates could be segregated for taxes, or whether a 75 year lease on an apartment building, or office building, could be segregated for taxes is not determined; merely that it isn't done doesn't necessarily mean that it couldn't be done; or merely because it would become a complex problem to figure out the proper value for such lease wouldn't necessarily mean it isn't an item of taxable property; yet in my view that question is not presented here and is not being passed upon; * * * and I am not making any commitment as to whether or not Sarpy County could tax the value of a leasehold interest in something to which possibly Congress has consented * * *" (App. to Pet., p. 14).

> "* * * certainly by no stretch of reasonable construction can the listing of improvements on leased property, or the listing of apartment houses, as was done on the 1952 personal property tax schedule return by the assessor for the plaintiff in this case, be properly construed to be returning for taxation the value of a leasehold interest therein. It is attempting to tax the improvements themselves, which I say you can not do because they belong to the United States Government and that has removed them beyond the field of Sarpy County to tax without consent * * *"

This conclusion was entirely correct. The assessment of the buildings was not an assessment of the lessee's interest, within the meaning of the Federal statute. A property tax is imposed on what is assessed and valued.[30] If that property is immune from State taxation, the States cannot tax it by characterizing the tax as on something or on somebody else.

United States v. *Allegheny County*, 322 U. S. 174, is directly in point. In that case the Mesta Machine Co. contracted to manufacture ordnance in Mesta's own plant. The Government leased certain machinery to Mesta to use in the manufacture of the artillery. This machinery was bolted on concrete foundations in Mesta's plant. The assessing authorities of Allegheny County separately appraised the machinery and added its value to the assessment against Mesta's plant. The Supreme Court of Pennsylvania held that the machinery could be taxed to Mesta as part of its plant. This Court reversed. It found (p. 185):

> "The procedure of the assessors is consistent with no other theory than that the machinery itself was being assessed and taxed exactly as land was being assessed and taxed."

30. In *United States* v. *Allegheny County*, 322 U. S. 174, 184 (1944), the Court noted that "the old and widely used ad valorem general property tax * * * involves the identification and valuation of the variable individual holdings to be taxed, commonly called the assessment * * *."

Similarly here, the record demonstrates, as the trial court held (App. to Pet., p. 14), that the assessment was imposed directly upon the Government-owned buildings and the appliances, and not upon a leasehold interest. As in the *Allegheny* case, "The assessor simply forthrightly valued * * * the Government's machines as machinery," here the assessor valued the Government's buildings and improvements as "improvements". The Court said in that case (p. 185):

> "We discern little theoretical difference, and no practical difference at all, between what was done and what would be done if the machinery were taxed in form. Its full value was ascertained and added to the base to which the annual rates would apply * * *."

The same is true of the Government-owned buildings here, except that the assessment schedule shows that they were taxed in form as well as in substance.

In the *Allegheny* case the Court rejected the argument that the tax was valid "because the incidence of the tax is borne by Mesta, not the Government" (p. 186). The Court declared that although it had upheld taxes on contractors with the Government (p. 186):

> "We have not held either that the Government could be taxed or its contractors taxed because property of the Government was in their hands."

The Court found it unnecessary to decide whether Mesta's interest as lessee-bailee of the machinery was taxable. The Court referred to Mesta's restricted "leasehold interest", but stated that (p. 187):

> "* * * the State has made no effort to segregate Mesta's interest and tax it. The full value of the property, including the whole ownership interest, as well as whatever value proper appraisal might attribute to the leasehold, was included in Mesta's assessment."

Just as the "full value" of the machinery was assessed in that case, so was the full value of the buildings assessed here. In neither case was there any attempt to separate the lessee's interest from that of the Government as owner.

In concluding, the Court pointed out that State's efforts to tax Government property were almost invariably directed at some private possessor of such property (pp. 187-189):

> "We think, however, that the Government's property interests are not taxable either to it or to its bailee. The 'Government' is an abstraction, and its possession of property largely constructive. Actual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purposes. He may be an officer, an agent, or a contractor. His personal advantages from the relationship by way of salary, profit, or beneficial personal use of the property may be taxed as we have held. But neither he nor the Government can be taxed for the Government's property interest. Rarely does a state or municipality pursue the Federal Government itself. Most of the immunity cases we have been called upon to deal with involved assertion of a right to tax Government property against an individual.
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> . . . . .
>
> "* * * We hold that Government-owned property, to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds it as a bailee."

Although the *Allegheny* case does not involve an interpretation of the phrase "lessee's interest" in a statute waiving immunity, it recognizes that a private "lessee's interest" in Government property may be taxed—which accords with the view expressed by the draftsmen of Section 6 of the 1947 Act that it was merely declaratory of

existing law (See pp. 30-31, *supra*).[31] The Court's holding that an assessment to the lessee of the full value of the leased property was a tax on the Government's property itself, and not on anything less, seems clearly inconsistent with the contention of respondents here that an assessment of the full value of the apartment buildings is only a tax on the lessee's interest and not on that of the Government which owns the buildings.

The court below implied that the tax was valid because the lessee's interest "for all intents and purposes was the actual value of all the buildings and improvements" (R. 209). But the issue is not as to the value of the lessee's interest, but whether the tax was imposed upon that interest or upon the tangible property itself, which was owned by the United States and not taxable. Just as in the *Allegheny* case, the assessor "made no effort to segregate" and tax the leasehold interest, or to determine its value. The Nebraska court cannot transform a tax on the Government properties into a tax on the lessee's interest.

Furthermore, a lessee's interest, by its very nature, is less valuable than the full title of which it is a part. This certainly was assumed in the discussion which led to the drafting of what is now Section 6. See pp. 29-30, *supra*. A tax on the full value of the buildings obviously includes the interest of the United States, as owner of the buildings, which Congress did not authorize the states to tax.

It will be argued that the relation between the length of the lease—75 years—and the profitable life expectancy of the buildings shows that the Government's interest in the buildings is zero, and the lessee's the equivalent of their full economic value. As we will show in a moment (*infra*, pp. 55-57), this is not the way in which long-term leases are

31. *Jetton v. University of the South*, 208 U. S. 489 (1908), permits taxation of a lessee's interest, but recognizes that such an interest "is a distinct and separate interest from that of the owner of the fee." (p. 504)

customarily valued. In any event, here the lessee has been deprived of control of the most important of the rights of the ordinary private lessee. He cannot do what he wants with the property. He may not assign his lease, or even sublet the apartments except as the Government permits. He is not free to determine the rents which the tenants must pay. The lessee thus cannot use the lease—as ordinary lessees of other property can—to obtain as much revenue as economic conditions permit. Control over all those matters is retained by the Government.

This curtailment of the lessee's rights means that his interest as lessee is substantially less valuable than would be that of other persons leasing similar buildings for the same period. The value of the buildings to him is likewise clearly not as great, under a lease containing restrictions as to such vital matters, as would be the value to an unrestricted owner in fee. And yet the Assessor seeks to tax him on the full value, just as he would such an unrestricted owner. Since the petitioner's interest is clearly less than would be that of an unrestricted owner of the buildings, to tax petitioner on their full value is not only to tax *more* than the lessee's interest, but also to tax the interest of the United States.

It is not necessary here to determine just how a lessee's interest should be evaluated. This Court in *United States* v. *Allegheny County, supra,* and other courts have held that where the full value of property has been assessed to a lessee as though he were the owner in fee, the assessment is invalid as a matter of law and the question of proper valuation and taxation of the lessee's interest is not presented for determination.[32] *State* v. *Springfield Convention*

32. In *State* v. *Springfield Convention Hall Ass'n, supra,* an assessment was made "against the 'building only' as the property

Hall Ass'n, 301 Mo. 663, 257 S. W. 113 (1923); *State* v. *Thompson*, 149 Mo. 441, 51 S. W. 98 (1899); *State* v. *Taylor*, 72 Tex. 297, 12 S. W. 176 (1888). The trial judge properly recognized the limitations on the judicial function when he asserted that (App. to Pet., p. 14):

> "* * * I do not know what the value of such leasehold interest would be, but that is something that does not have to be passed upon at this time in order to decide the issues in the case presented * * *."

This is in accordance with the established policy of this Court not to pass upon "problems merely hypothetical" (*Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 384 (1933)), but to limit itself to "concrete and specific issues" raised by facts in the record of the particular case. *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 746 (1942); *United States* v. *Hamburg-American Co.*, 239 U. S. 466, 475-476 (1916); *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 324, 339 (1936).

For present purposes, it should be sufficient to state that although the problem of evaluating a leasehold interest is not simple, no authorities (except the cases presently before this Court) hold or suggest that in circumstances where the lease subordinates the lessee to the lessor-owner in control of those economic rights which enable a lessee to

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of the defendant." In affirming a judgment for the defendant lessee in an action to recover taxes on the building, the court stated (301 Mo. at 672, 257 S. W. at 116):

> "This instrument created a leasehold estate, covering both lot and building and not an ownership of the building. In such case, where there is no assessment of the leasehold estate (as here), then there can be no judgment for taxes against the lessee."

And in *State* v. *Taylor*, *supra*, the court declared (72 Tex. at 297, 12 S. W. at 177):

> "* * * it is not necessary for us to inquire whether appellees are liable to taxation on their leasehold estate. No assessment of that was made, and the courts could not make the assessment if, on inquiry, it should be found that the leasehold held by appellees was subject to taxation."

attain the full value of the property leased, the full value of such property can be charged to the lessee. Indeed, where such an assessment was suggested by the taxing authorities, a reviewing court stated: "If * * * respondent were compelled to pay upon the amount of its investment, the tax would be grossly excessive." *Metropolitan Building Co.* v. *King County*, 62 Wash. 409, 412, 113 Pac. 1114, 1115 (1911).

The worth of even an unrestricted lessee's interest is usually reckoned as the value of the term less the rent reserved in the lease. *Metropolitan Building Co.* v. *King County*, 62 Wash. 409, 113 Pac. 1114 (1911);[33] *People* v. *Barker*, 121 N. Y. App. Div. 661, 106 N. Y. Supp. 336 (1907), aff'd 200 N. Y. 509, 93 N. E. 78 (1910); *Appeal Tax Court* v. *Western Md. R. Co.*, 50 Md. 274, 298 (1879); Annotation, *Method or rule for valuation of leasehold interest for purpose of property taxation*, 84 A. L. R. 1310 (1933). Contra, *De Luz Homes, Inc.* v. *County of San Diego*, 45 Adv. Cal. 575, 290 P. 2d 544 (1955), overruling *Blinn Lumber Co.* v. *Los Angeles County*, 216 Cal. 468, 14 P. 2d 516 (1932), in which California had followed the general rule. Where, as here, the rent is nominal but the lessee is obligated to erect substantial improvements which inure to the benefit of the lessor, the cost of such improvements is recognized as additional rent. *State* v. *Springfield Convention Hall Ass'n*, 301 Mo. 663, 257 S. W. 113 (1923); *Maricopa County* v. *Fox Riverside Theatre Corp.*, 60 Ariz. 260, 135 Pac. 2d 513, 514 (1943).[34] Thus the value of such a

33. "In determining the worth of the leasehold, the courts have universally held that it is the value of the term less the rent reserved." *Metropolitan Building Co.* v. *King County*, 62 Wash. 409, 410, 113 Pac. 1114, 1115.

34. In the *Springfield* and *Maricopa* cases, the courts held that buildings constructed on leased public lands could not be taxed to the lessees. In the *Springfield* case the court said (301 Mo. at 674, 257 S. W. at 116):

"The lease, read as a whole, means that the city leased to

leasehold is computed by deducting from the potential income which is to be capitalized, all costs, including the amortized cost of the improvements. *In Re Metropolitan Building Co.*, 144 Wash. 469, 258 P. 473, 476 (1927); *People* v. *Feitner*, 61 N. Y. App. Div. 129, 70 N. Y. Supp. 500, 502 (1901), affirmed 171 N. Y. 641, 63 N. E. 786 (1902).

C. The Tax on the Appliances and Furniture Was Not Imposed on a Lessee's Interest.

The assessment on the appliances (including the furniture) is invalid for a different reason. There is no question, of course, that this personal property is owned by petitioner. As property on an exclusive Federal enclave, the appliances are not taxable by the State, except to the extent that Congress has granted permission (see pp. 17-18, *supra*). But no statute has waived the Federal immunity for such property. The provision of the 1947 Leasing Act relied upon by the court below deals only with *leased* Government property. It was not concerned with anything else. As has been seen, it provides that:

> "The lessee's interest, *made or created pursuant to the provisions of this Act*, shall be made subject to State or local taxation." (Emphasis supplied.)

Here the appliances were purchased by petitioner in its own name, and never belonged to the Government. They have not been leased by the Government to petitioner.

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defendant the land and the building which defendant might put upon it for a period of 50 years. The cost of the building and the additional sum of $50,000 in annual payments constituted the rent or consideration for the lease."

In the *Maricopa* case, the court said (60 Ariz. at 264, 135 P. 2d at 514):

> "In this case, like the one herein, substantial buildings and improvements were erected and, as in this case, they were part of the consideration for the lease."

Petitioner did not acquire an interest in them as a lessee, from the Government or anyone else.

Furthermore, the petitioner's interest in such property is not derived from any rights created by the 1947 Leasing Act, but entirely from its own purchases of the property. The only "lessee's interest" which that statute authorizes to be taxed is an "interest, made or created pursuant to the provisions of this Act". "This Act" deals only with the leasing of Government property, not with other property which a lessee may own. And clearly the petitioner's interest in its own property was not "made or created" by or under or pursuant to the provisions of the 1947 statute. The Act neither made nor created petitioner's interest in the appliances purchased from private suppliers.

As the trial court in this case aptly stated (App. to Pet., p. 12):

> "* * * construction of the consent statute—of the consent section of the statute involved—certainly cannot be extended to include such property because that property is not even owned by the United States Government. What consent was being granted? Consent to lease Government owned rea and personal property. That is the consent that you are talking about in that section of the 1947 Act pertaining to the leasing of real and personal property of the Government. The Government never owned the appliances. * * * so that the matter of giving consent to taxing of leased personal property would not be applicable to the personal property involved in this case at all, if there is by proper construction a consent of Congress even granted."

Whatever interest the petitioner had in such property was not made or created under the Act or by a lease. The status of this property, therefore, was the same as that of any personal property on an exclusive Federal enclave, unaffected by Section 6.

CONCLUSION.

For the reasons set forth above, the judgment of the court below should be reversed.

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APPENDIX.

STATUTES INVOLVED.

1. The Wherry Military Housing Act of August 8, 1949, 63 Stat. 570, 12 U. S. C. § 1748, which added Title VIII—Military Housing Insurance to the National Housing Act. The pertinent provisions read as follows:

"Sec. 803. (a) In order to assist in relieving the acute shortage of housing which now exists at or in areas adjacent to military installations because of uncertainty as to the permanency of such installations and to increase the supply of rental housing accommodations available to military and civilian personnel at such installations, the Commissioner is authorized, upon application of the mortgagee, to insure mortgages (including advances on such mortgages during construction) which are eligible for insurance as hereinafter provided, and, upon such terms as the Commissioner may prescribe, to make commitments for so insuring such mortgages prior to the date of their execution or disbursement thereon: *Provided*, That the aggregate amount of principal obligations of all mortgages insured under this title shall not exceed $500,000,000 except that with the approval of the President such aggregate amount may be increased to not to exceed $1,000,000,000: *And provided further*, That no mortgage shall be insured under this title after July 1, 1951, except (A) pursuant to a commitment to insure issued on or before such date, or (B) a mortgage given to refinance an existing mortgage insured under this title and which does not exceed the original principal amount and unexpired term of such existing mortgage.

"(b) To be eligible for insurance under this title a mortgage shall meet the following conditions:

"(1) The mortgaged property shall be held by a mortgagor approved by the Commissioner. The Com-

missioner may, in his discretion, require such mortgagor to be regulated or restricted as to rents or sales, charges, capital structure, rate of return, and methods of operation. The Commissioner may make such contracts with, and acquire for not to exceed $100 stock or interest in, any such mortgagor, as the Commissioner may deem necessary to render effective such restriction or regulation. Such stock or interest shall be paid for out of the Military Housing Insurance Fund, and shall be redeemed by the mortgagor at par upon the termination of all obligations of the Commissioner under the insurance.

"(2) The mortgaged property shall be designed for rent for residential use by civilian or military personnel of the Army, Navy, Marine Corps, or Air Force (including Government contractors' employees) assigned to duty at the military installation at or in the area of which such property is constructed. Nothwithstanding the provisions of any other law, preference or priority of opportunity in the occupancy of the mortgaged property for such personnel and their immediate families shall be provided under such regulations and procedures as may be prescribed by the Commissioner. No mortgage shall be insured under this title unless the Secretary of Defense or his designee shall have certified to the Commissioner that the housing with respect to which the mortgage is made is necessary to provide adequate housing for such personnel, that such installation is deemed to be a permanent part of the Military Establishment, and that there is no present intention to substantially curtail activities at such installation.

"(3) The mortgage shall involve a principal obligation in an amount—

"(A) not to exceed $5,000,000; and

"(B) not to exceed 90 per centum of the amount which the Commissioner estimates will be the replacement cost of the property or project when the proposed improvements are completed; and

"(C) not to exceed an average of $8,100 per family unit for such part of such property or project as may

be attributable to dwelling use, except that where the Secretary of Defense or his designee in exceptional cases certifies and the Commissioner concurs in such certification that the needs would be better served by single-family detached dwelling units the mortgage may involve a principal obligation not to exceed $9,000 per family unit for such part of such property as may be attributable to such dwelling units.

"The mortgage shall provide for complete amortization by periodic payment within such terms as the Commissioner shall prescribe, and shall bear interest (exclusive of premium charges for insurance) at not to exceed 4 per centum per annum of the amount of the principal obligation outstanding at any time. The Commissioner may consent to the release of a part or parts of the mortgaged property from the lien of the mortgage upon such terms and conditions as he may prescribe and the mortgage may provide for such release.

* * * * *

"Sec. 805. Whenever the Secretary of the Army, Navy, or Air Force determines that it is desirable to lease real property within the meaning of the Act of August 5, 1947 (61 Stat. 774), to effectuate the purposes of this title, the Secretary concerned is authorized to lease such property under the authority of said Act upon such terms and conditions as in his opinion will best serve the national interest without regard to the limitations imposed by said Act in respect to the term or duration of the lease, and the power vested in the Secretary of the Department concerned to revoke any lease made pursuant to said Act in the event of a national emergency declared by the President shall not apply. Whenever the Secretary of the Army, Navy, or Air Force determines it to be in the interest of national defense, he is hereby authorized to sell, transfer, and convey at fair value (as determined by him), for use under this title, all or any right, title, and interest in any real property under his jurisdiction, notwithstanding any limitations or requirements of law with respect to the use

or disposition of such property. The authority conferred by this section shall be in addition to and not in derogation of any other power or authority of the Secretary of the Army, Navy, or Air Force.

* * * * * * *

"Sec. 807. Nothing in this title shall be construed to exempt any real property acquired and held by the Commissioner under this title from taxation by any State or political subdivision thereof, to the same extent, according to its value, as other real property is taxed."

2. Housing Amendments of 1955, Public Law No. 345, Ch. 783, 84th Cong. 1st Sess., approved August 11, 1955. The pertinent provisions read as follows:

"Sec. 805. Whenever the Secretary of the Army, Navy, or Air Force determines that it is necessary to lease any land held by the United States on or near a military installation to effectuate the purposes of this title, he may lease such land upon such terms and conditions as will, in his opinion, best serve the national interest. The authority conferred by this section shall be in addition to and not in derogation of any other power or authority of the Secretary of the Army, Navy, or Air Force.

* * * * * * *

"Sec. 807. The Commissioner is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this title. In the performance of, and with respect to, the functions, powers and duties vested in him by this title, the Commissioner, notwithstanding the provisions of any other law, shall appoint a Special Assistant for Armed Services Housing for Mortgage Insurance, and provide the Special Assistant with adequate staff, whose whole responsibility will be to expedite operations under this title and to eliminate administrative obstacles to the full utilization of this title under the direction and supervision of the Commissioner."

The 1955 statute contains the following savings provision:

"Sec. 408. Notwithstanding the provisions of section 401 of this Act, the provisions of title VIII of the National Housing Act in effect prior to the enactment of the Housing Amendments of 1955 shall continue in full force and effect with respect to all mortgages insured pursuant to a certification by the Secretary of Defense or his designee made on or before June 30, 1955, and a commitment to insure issued on or before June 30, 1956 or pursuant to a certification by the Atomic Energy Commission or its designee made on or before June 30, 1956, except that the maximum dollar amount for each such mortgage shall be $12,500,000."

3. Military Leasing Act of August 5, 1947, 61 Stat. 774, 5 U. S. C. § 626s-3, *et seq.*

"[Section 1] * * * Whenever the Secretary of War or the Secretary of the Navy [or the Secretary of the Air Force] shall deem it to be advantageous to the Government he is authorized to lease such real or personal property under the control of his Department as is not surplus to the needs of the Department within the meaning of the Act of October 3, 1944 (58 Stat. 765), and is not for the time required for public use, to such lessee or lessees and upon such terms and conditions as in his judgment will promote the national defense or will be in the public interest. Each such lease shall be for a period not exceeding five years unless the Secretary of the Department concerned shall determine that a longer period will promote the national defense or will be in the public interest. The Secretary of the Department concerned may include, among other terms and conditions in the lease, a right of first refusal in the lessee to purchase the property in the event of the revocation of the lease in order to permit sale thereof by the Government, but this section shall not be construed as authorizing the sale of any property unless the sale thereof is otherwise authorized by law.

Each such lease shall contain a provision permitting the Secretary of the Department concerned to revoke the lease at any time, unless the Secretary shall determine that the omission of such provision from the lease will promote the national defense or will be in the public interest. In any event each such lease shall be revocable by the Secretary of the Department concerned during a national emergency declared by the President. Notwithstanding section 321 of the Act of June 30, 1932 (47 Stat. 412; U. S. C., title 40, sec. 303b), or any other provision of law, any such lease may provide for the maintenance, protection, repair, or restoration by the lessee, of the property leased or of the entire unit or installation where a substantial part thereof is leased, as a part or all of the consideration for the lease of such property. In the event utilities or services shall be furnished by the Department concerned to the lessee in connection with any lease, payments for utilities or services so furnished may be covered into the Treasury to the credit of the appropriation or appropriations from which the costs of furnishing any such utilities or services to the lessee was paid. Except as otherwise hereinabove provided, any money rentals received by the Government directly under any such lease shall be deposited and covered into the Treasury as miscellaneous receipts. The authority herein granted shall not apply to oil, mineral, or phosphate lands. The Secretary of War or the Secretary of the Navy, as the case may be, shall submit to the Congress on the 1st day of January and the 1st day of July of each year, following the enactment of this law, a report of all leases entered into in accordance with the provisions of this Act.

"Sec. 2. The Act of July 28, 1892, as amended (27 Stat. 321; 45 Stat. 988; U. S. C., title 40, sec. 303), is hereby repealed. So much of the Naval Appropriation Act of August 29, 1916, as is contained under the heading 'Lease of Naval Lands', as amended (39 Stat. 559; 45 Stat. 990; U. S. C., title 34, sec. 522), is hereby repealed.

"Sec. 3. (a) Notwithstanding any other provision of law, all right, title, and interest of Reconstruction Finance Corporation in any plants or facilities, and the machinery, equipment, and other personal property accessory thereto, acquired by Defense Plant Corporation or Reconstruction Finance Corporation in accordance with authority contained in the Reconstruction Finance Corporation Act (U. S. C., title 15, secs. 601-617) pursuant to undertakings by the War Department or the Navy Department to reimburse Defense Plant Corporation or Reconstruction Finance Corporation to the extent of the unrecovered cost thereof in the event Congress authorizes such reimbursement by making appropriations therefor, shall be transferred by Reconstruction Finance Corporation (or by War Assets Administration, if such property has been declared surplus) to the War Department or the Navy Department upon certification by the Secretary of War or the Secretary of the Navy made within six months after the enactment hereof, that the retention of such plants or facilities, and the machinery, equipment, and other personal property accessory thereto, by the War Department or the Navy Department, as the case may be, is necessary for the maintenance of an adequate Military or Naval Establishment including industrial reserve.

(b) Notwithstanding any other provision of law, all right, title, and interest of Reconstruction Finance Corporation or War Assets Administration in any machinery or equipment shall be transferred by the agency having control thereof to the War Department or the Navy Department upon certification by the Secretary of War or the Secretary of the Navy made within six months after the enactment hereof, that the retention of such machinery or equipment by the War Department or the Navy Department, is necessary for the maintenance of an adequate Military or Naval Establishment, including industrial reserve.

"Sec. 4. Any transfer made pursuant to section 3 of this Act shall be approved by the Director of the Bureau of the Budget to the extent and in the manner determined by him and shall be made without charge

or reimbursement from the funds available to the War Department or the Navy Department, except for costs of packing, handling, and transportation of machinery and equipment transferred under section 3 (b) hereof.

"Sec. 5. (a) Whenever in the opinion of the Secretary of War or the Secretary of the Navy, as the case may be, the interests of national defense require assurance of the continued availability for war-production purposes of the industrial capacity of shipyards, plants, and equipment which are surplus to the needs of their respective Departments or of the Reconstruction Finance Corporation within the meaning of the Surplus Property Act of 1944, they are authorized to direct the imposition of such terms, conditions, restrictions, and reservations in the disposition of such property by the disposal agency under said Act as will in the opinion of the Secretary concerned be adequate to assure such continued availability.

(b) In the event the disposal agency is unable to dispose of any such industrial plants and equipment subject to such terms, conditions, restrictions, or reservations as have been imposed, within a reasonable time and after such property shall have been offered for sale and reasonable efforts made to dispose of the same, the Department imposing such terms, conditions, restrictions, or reservations shall (1) modify them to the extent necessary to permit the sale or lease of such property, (2) withdraw the property from surplus, or, in the case of Reconstruction Finance Corporation property, request a transfer thereof in the manner provided in sections 3 (a) and 4 of this Act, or (3) eliminate and waive the requirement for the imposition of any terms, conditions, restrictions, or reservations made under the authority of this section.

"Sec. 6. The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of this Act shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated."

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 404

OFFUTT HOUSING COMPANY, A CORPORATION,

Petitioner,

vs.

COUNTY OF SARPY AND ROBERT M. EBY, TREASURER OF COUNTY OF SARPY, NEBRASKA,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

REPLY BRIEF FOR PETITIONER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 404.

OFFUTT HOUSING COMPANY, A CORPORATION,
Petitioner,

vs.

COUNTY OF SARPY AND ROBERT M. EBY, TREASURER OF COUNTY OF SARPY, NEBRASKA,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

REPLY BRIEF FOR PETITIONER.

This memorandum will deal with several of the points raised in respondents' brief and in the brief for Grant County, Washington, as *amicus curiae*,[1] and also will call attention to one pertinent recent decision.

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1. In view of the law in the State of Washington, to which the brief for Grant County does not refer, the relationship between this case and the Grant County litigation is difficult to perceive. Since, according to *amici*, the State of Washington has concurrent jurisdiction over the Moses Lake project, along with the United States, the question in this case as to the effect of exclusive federal jurisdiction over the land involved has no relevance for Grant County. Where there is no exclusive jurisdiction, the state or locality may tax the lessee's interest, but not the Government's property, as our main brief states. The Washington Supreme Court has so held for private housing projects on leased public land, in cases in which it has refused to let the locality tax the lessee for the full value of the buildings. *Metropolitan Building Co.* v. *King County*, 62 Wash. 409, 113 Pac. 1114 (1911); *Metropolitan Building Co.* v. *King County*, 64 Wash. 615, 117 Pac. 495 (1911); *Metropolitan Building Co.* v. *King County*, 72 Wash. 47, 129 Pac. 883 (1913); *In re Metropolitan Building Co.*, 144 Wash. 469, 258

1. On March 5, 1956, the Supreme Court of Appeals of Virginia, affirming the judgment of the Circuit Court referred to in the petition for certiorari, held that a housing project at the Marine Corps base at Quantico was not taxable by Prince William County. *County of Prince William* v. *Thomason Park, Incorporated*, No. 4467. In that case, as here, the taxing authority had "assessed only the buildings erected on the leased premises by lessee, but in so doing fixed the assessments at the same valuations that would have been placed thereon if the land had been owned in fee simple by lessee. No attempt was made to assess lessee with a leasehold tax." The court held that, under a lease identical with that used in the instant case, "title

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P. 473 (1927). The trial court in the *Moses Lake* litigation, which is very inadequately described in the *amicus* brief, has given effect to these decisions in holding that the lessee could be taxed for the value of the buildings only for the period before the United States acquired title to them. *Moses Lake Homes* v. *Grant County*, Super. Ct. for Grant County, No. 8095, Opinions of October and December 1952. We are advised that the appeal to the Washington Supreme Court in that case (No. 32442), which involved the period before the United States acquired the title, was withdrawn because the case was settled by stipulation. In the case presently pending in the Washington Supreme Court, the trial court decided, as a matter of state law, that the buildings were "tax exempt after the United States acquired title," and that "the United States did acquire title," under a lease similar to that at bar. *Moses Lake Homes* v. *Grant County*, Super. Ct. of Grant County, No. 8788, transcript of June 15, 1955, p. 14, appeal pending Wash. Sup. Ct. No. 33507.

Grant County's difficulty seems to be with the state law of Washington, which stands in the way of its attempt to tax the full value of the buildings. But that is a matter which this Court cannot remedy, in this case or any other.

The Grant County brief does cite a recent decision of the Washington Supreme Court in *Moses Lake Homes* v. *State of Washington*, 148 Wash. Dec. 462 (Adv. Ed. No. 16, published March 28, 1956). But that case holds only that the Washington retail sales tax applies to purchases of material for incorporation in the housing project by the lessee. The Court recognized that the Federal Government obtained title to the buildings on their completion, but properly held that this did not relieve the lessee of its obligation to pay the sales tax.

to the improvements vested upon their erection in the United States", a conclusion contrary to that of the Nebraska court, which found that lessee "was in fact and as a matter of law the owner of all the improvements" (R. 210) and that the Government held only a "bare legal title" (R. 209). The Virginia opinion states in this connection:

> "In the instant case, no right of removal was reserved to the lessee, but to the contrary and as pointed out above, the lease contract expressly provides that the improvements shall remain on the land and be the property of the federal government without compensation. Hence, title to the improvements vested upon their erection in the United States in fee simple, and therefore the only property owned by lessee is a leasehold interest in the land and buildings for a fixed period of years."

The Virginia court then concluded that, for the tax years in question, Virginia law did not authorize taxation of a lessee's interest.

The opinion also declares that Congressional consent "to tax property owned by the United States * * * being in derogation of the sovereign power of the federal government, is found only where Congress has spoken in the clearest language," and that "even if the United States has receded taxing jurisdiction to the state and its political subdivisions, it did not consent to taxation of property owned by the United States, but at most limited its consent to taxation of the interest of the lessee." In view of its conclusion that the tax was not authorized under Virginia law, the court found it "unnecessary to decide whether the Wherry Act, in referring to the Military Leasing Act, sufficiently indicates that consent was granted to tax any property of the lessee where that property is located in a federal enclave." A copy of the Virginia opinion has been filed with the Clerk.

The *amicus* brief for Grant County asserts that every appellate court dealing with these projects has held them taxable. Counsel were doubtless unaware of the Virginia decision. Moreover, of the numerous cases they cite, only the *Fort Dix* decision presently pending in this Court involved the combination of facts presented here—exclusive federal jurisdiction over the area, a lease in which the United States retained title to the buildings, and a tax on the Government-owned buildings. The statement by *amicus* that "From the reported cases, they [the housing projects] are all being taxed" (*Amicus* brief, p. 30) disregards the material listed in the petition for certiorari (pp. 14-15) which shows that in a great many states, including Washington, the value of leased buildings has been declared not to be taxable to the lessee. See also the Appendix to the *Memorandum for the United States as Amicus Curiae.*

2. Respondents contend (Br., pp. 6-7) that because the Nebraska consent statute, Sec. 72-601 (R. R. S. Neb., 1943), refers only to the "purchase by the United States of lands in the state," Nebraska has not consented to the exercise of exclusive jurisdiction by the United States over the 48.11 acres donated to the United States by the Omaha Chamber of Commerce. This argument, seemingly based on Nebraska law, was rejected by the Supreme Court of Nebraska, which stated in its opinion that (R. 201):

> "Forty-eight acres of such described land[2] had been previously deeded to the United States by the Omaha Chamber of Commerce and the Air Force had appropriately taken exclusive jurisdiction thereof."

The Nebraska statutes on their face show that the word "purchase" was broadly used, as in the provision of the United States Constitution from which it was undoubtedly

2. In fact, less than half of the 48 acres was included in the leased land. See p. 6, *infra*.

taken.[3] (See our main brief, pp. 21-22.) Section 72-604 (R. R. S. Neb., 1943) states that:

> "The jurisdiction ceded shall not vest until the United States shall have acquired the title to such lands by purchase *or grant*."[4] (Emphasis supplied.)

This language clearly implies that the word "purchase" as used in Section 601 of the same statute was meant to encompass a grant, and not to be limited strictly to a purchase in the sense of the law of sales. No Nebraska decision supports respondents' contention that the Nebraska law should be more narrowly construed, and the decision below looks to the contrary. It is also to be noted that the deed of the 48.11 acres to the United States is expressed in terms of purchase, since it provides that the Chamber of Commerce "does hereby grant, bargain, *sell*, convey and confirm unto the United States" the described real estate (R. 189).

Furthermore, even respondents concede that their contention relates only to a portion of the leased property, a portion which the tax assessor never separately identified. They assert (Br., p. 6) that all 48 acres granted by the Chamber of Commerce are included in the 63 acres leased to petitioner. A comparison of the description of the land

3. The pertinent provision of Section 601 reads as follows:

> "The consent of the State of Nebraska is granted to the United States of America * * * for the purchase by the United States of such other lands within the State of Nebraska as the agents or authorities of the United States may from time to time select for the erection of forts, magazines, arsenals and other needful buildings."

This language is obviously taken from Article I, Section 8, Clause 17 of the United States Constitution.

4. Sec. 72-604:

> "The jurisdiction ceded shall not vest until the United States shall have acquired the title to such lands by purchase or grant. So long as the lands shall remain the property of the United States, when acquired as provided in section 72-601, and no longer, they shall be exempt from all taxes, assessments, and other charges which may be levied or imposed under the authority of the laws of this state."

in the Chamber of Commerce deed (R. 189) and in the lease (Ex. 4, unprinted portion, on file with the Clerk) will demonstrate, if it makes any difference, that only about 20 of the 48.11 acres are included in the 63 acres leased. Thus the major portion of the leased tract, including that upon which most of the apartments have been constructed, is located on land purchased by the United States before the acquisition of the 48.11 acres.

Crook, Horner & Co. v. *Old Point Comfort Hotel Co.*, 54 Fed. 604 (C. C. E. D. Va., 1893), cited by respondents, held only that property ceded by Virginia to the United States, on condition that it revert to the state if not used for purposes of national defense, reverted to the state when used for a private hotel. This Court so described the case in *Arlington Hotel Co.* v. *Fant*, 278 U. S. 439, 455 (1929).

3. The Grant County brief (p. 8) states several times (pp. 11-14) that the Nebraska court has held as a matter of state law that Nebraska did not cede exclusive jurisdiction to the United States, but reserved the right to tax the property here involved, and that Nebraska law determines whether improvements may be taxed at their full value. But this argument misapprehends what the Nebraska Supreme Court said. That Court did not decide that the Federal Government lacked exclusive jurisdiction. On the contrary, it recognized that the United States possessed such jurisdiction (R. 201), but concluded that Congress had waived the Federal immunity from taxation in the 1947 and 1949 statutes and thereby *pro tanto* receded jurisdiction to the State (R. 200, 205). Whether that is so obviously presents Federal questions for this Court to decide. And the *Allegheny County* case and others cited in our main brief demonstrate that this is also true of the issue whether a tax is imposed on a lessee's interest or on Government property.

The *amicus* brief mistakenly assumes that because the Nebraska court sustained the tax, it did so on state law grounds. The Nebraska court held, of course, that the tax was valid under Nebraska law. The tax would not have been sustained unless authorized under state law as well as Federal. But this does not make decisions of the Federal questions unnecessary.

4. Respondents argue (Br., pp. 11-14) that the lease itself suspends the exclusive jurisdiction of the United States. Certainly the lease does not so provide, nor does any act of Congress.

Obviously the leasing of Government property does not in itself terminate the Government's exclusive jurisdiction. In *Arlington Hotel Co.* v. *Fant*, 278 U. S. 439 (1929), exclusive federal jurisdiction was sustained as to a private hotel "operated for more than 50 years under lease from the United States" (p. 449). In *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, 521 (1938), property leased from the Government for 20 years was held to be subject to exclusive federal jurisdiction (except as limited by California's act of cession). *United States* v. *Unzeuta*, 281 U. S. 138 (1930), recognized exclusive federal jurisdiction over a right-of-way, "permanent use" (p. 145) of which was granted to a railroad company. These cases establish that the United States does not lose its jurisdiction because it permits private parties to use a portion of an enclave, even for a long period.

We submit, therefore, that the lease cannot be said to deprive the United States of its jurisdiction over the property. And even if the contrary could be true as to long-term leases in some circumstances, where the United States retained no control over or interest in leased property, the opposite is the case here. Our main brief (pp. 8, 42-45) points out that the Government has preserved a substan-

tial portion of the important rights normally vested in the owner of property, such as determining the rent which can be charged and the identity of the sub-tenants and the duration of their leases.[5] Lessee cannot assign, remodel, reconstruct, demolish or subtract from the premises without government approval. (R. 150, 136.)

Furthermore, since all long-term leases clearly do not oust the jurisdiction of the United States, to hold that some have that effect would subvert another Congressional policy. In view of difficulties arising from prior uncertainty, Congress in 1940 specified the manner in which the United States should acquire jurisdiction. 54 Stat. 19, 1084, 40 U. S. C. § 255. The purpose was to create "a definite method of acceptance of jurisdiction so that all persons could know whether the Government had obtained" it. *Adams* v. *United States*, 319 U. S. 312, 314 (1943). If jurisdiction over leased property were not dependent upon formal acceptance or recession by the proper authorities, but upon an evaluation of miscellaneous pertinent facts relating to the use of property, it would seldom be possible to tell without litigation whether leased property was subject to the jurisdiction of the United States or of a state. This would produce the very uncertainty which Congress thought it had eliminated when it passed the Act of 1940.

Respondents cite *S. R. A., Inc.* v. *Minnesota*, 327 U. S. 558 (1946), as authority both that a token title in the United States will not serve as a basis for federal jurisdiction and that an express recession by Congress is not essential. In that case, discussed at pages 45-46 of our main brief, the Government sold a Post Office and office building in St. Paul, Minnesota, over which it had had

5. Leases are required to be for one year, and thereafter from month to month, but terminable by the tenant in case of transfer or separation from the service. (R. 134.)

exclusive jurisdiction. It retained only a security interest in case of default in the purchase price, an interest the same as that of an ordinary mortgagee, and "essentially * * * only a credit device." (*Schnitzer* v. *Fruehauf Trailer Co.*, 283 App. Div. 421, 431, 128 N. Y. S. 2d 242, 253, aff'd. 307 N. Y. 876, 122 N. E. 2d 754 (1954).) This Court properly held that such an "unrestricted transfer of property to non-federal hands is a relinquishment of the exclusive legislative power," as a "rule of necessity," despite the absence of any express Congressional retrocession (p. 564). The consequence otherwise, the Court noted, would have been to "leave numerous isolated islands of federal jurisdiction."

The *S. R. A.* case did not suggest that even a long lease was such an "unrestricted transfer of property" as would terminate the federal jurisdiction; the cases cited above with respect to leases of federal property show that this cannot be so. A lease does not deprive the lessor of all equitable and beneficial interest in the property; his interest is more than a mere credit device to protect his security. In this case, as has been pointed out, the lessor retains substantial control. Furthermore, to hold that the Government was divested of leased property on a federal reservation could create isolated islands of non-federal jurisdiction in the midst of a federal area, which would be as anomalous as the converse situation which the *S. R. A.* case sought to avoid.[6] The "necessity" which resulted in an exception from the rule that waivers of jurisdiction be clearly expressed is thus entirely lacking here. On the contrary, the leased property is still being used for an important governmental purpose under very substantial and direct supervision by the Federal Government.

5. In our main brief (pp. 55-57) we have pointed out

6. That would be true in the instant case.

that the courts generally permit taxing a lessee for the value of *his interest* in leased property, but not for the full value of improvements which he does not own. This is unquestionably the law in the State of Washington. (See note 1, *supra*, p. 1.) The Grant County brief (pp. 18-19) cites a number of cases from other jurisdictions (and one Washington case not in point) as if they established as a matter of general law that a lessee under a long-term lease is taxable for the value of buildings on the leased property whether or not he has title. These authorities do not, however, stand for any such proposition; they fall into a number of readily distinguishable categories.

Railroad Company v. *Peniston*, 18 Wall. 5 (1873) and *Thomson* v. *Pacific Ry.*, 9 Wall. 579 (1870), involved the taxability of the property of railroads, which acted as agencies for the Government in performing transportation functions, but in whose property the Government had no interest except as a second mortgagee. Other cases cited held, like the *S. R. A.* case, that beneficial owners under a conditional sales contract could be taxed, although legal title for security purposes remained in the vendor. *San Diego County* v. *Davis*, 1 Cal. 2d 145, 33 P. 2d 827 (1934); *Hines Lumber Co.* v. *Lane County*, 196 Ore. 420, 248 P. 2d 720 (1952). In *Wisconsin R. Co.* v. *Price County*, 133 U. S. 496 (1890), and *Haumesser* v. *Chehalis County*, 76 Wash. 570, 136 Pac. 1141 (1913), it was held that the legal title of the Government as trustee did not preclude taxing a patentee of land who was in possession and had all equitable and beneficial rights, pending formal issuance of his patent. Cf. *Irwin* v. *Wright*, 258 U. S. 219 (1922).

In most of the cases cited involving leases, the lessee had title to the buildings on the leased premises for which he was being taxed. Thus, in *Philadelphia, Wilmington & Baltimore R. Co.* v. *Appeal Tax Court*, 50 Md. 397 (1879), a leading Maryland case, the lease was for 99 years, re-

newable forever, and the buildings were constructed by the railroad for its sole use and benefit and obviously belonged to it. The court held that the railroad could be taxed on the full value of the buildings, but only on its lessee's interest in the land. *Norfolk* v. *J. W. Perry Co.*, 108 Va. 28, 61 S. E. 867 (1908), also involved buildings on a lease renewable forever, which plainly belonged to the lessee. In *Russell* v. *New Haven*, 51 Conn. 259 (1883), and *Burbank* v. *Board of Assessors*, 52 La. Ann. 1506, 27 So. 947 (1900), provisions of the leases show that title to the improvements was meant to remain in the lessee. *Broadway & Fourth Ave. Realty Co.* v. *Louisville*, 303 Ky. 202, 197 S. W. 2d 238 (1946), held (contrary to a provision in the lease) that a lessee of seminary land for 99 years owned the buildings he had erected, since the buildings were "alienated from seminary domination and control"—which is precisely the opposite of the situation here. *Garland County* v. *Gaines*, 56 Ark. 227, 19 S. W. 602 (1892), held that a lessee's interest was taxable, but without defining it. *Outer Harbor Dock & Wharf Co.* v. *Los Angeles County*, 47 Cal. App. 194, 193 Pac. 142 (1920), and *San Francisco* v. *McGinn*, 67 Cal. 110, 7 Pac. 187 (1885), upon which the *Outer Harbor* case relies, read in the light of a companion opinion in another *Outer Harbor* case subsequently written by the same judge for the same court (*Outer Harbor Dock & Wharf Co.* v. *City of Los Angeles*, 49 Cal. App. 120, 193 Pac. 137 (1920))[7] stand only for the proposition that when a lessee has title to buildings, he may be taxed for their value, but otherwise only for the value of his interest as lessee. In the second *Outer Harbor* case, a tax on the full value of the leased improvements was reversed (49 Cal. App. at 128, 193 Pac. at 140). And this case notes that in the *McGinn* decision the trial court had found that lessee had the right to re-

7. The case reported at 193 Pac. 137 was decided on August 30, 1920, while the case reported at 193 Pac. 142 was decided on April 21, 1920, rehearing denied May 21, 1920.

move the improvements and was accordingly their owner" (49 Cal. App. at 128-129, 193 Pac. 140-141). The court thought that this explained the short opinion in the *McGinn* case, which had not mentioned these facts. This view expressed in the second *Outer Harbor* case is in accord with subsequent California decisions (cited in our main brief, p. 56) which hold that a lessee may be taxed only for the value of his interest, and differ only in the formula to be used in evaluating that interest.

In short, the cases cited by *amicus* do not hold that a lessee may be taxed for buildings which he does not own, even where there is a long-term lease. Except perhaps for the Kentucky case, they only allow taxation of the lessee's interest, and even in the Kentucky case the decision was based upon the fact that lessor retained no control over the property. Here, as our main brief points out (pp. 8-10, 43-44), the Government as lessor has retained both the title and major attributes of control.

We agree that a bare legal title in the Government without more does not preclude taxation of the beneficial interest in another person. But we insist (1) that the interest of a lessor who retains title to improvements has not been regarded as that bare, so that even for a long-term lease only the lessee's interest and not the full value of the improvements is taxable to lessee, and (2) that in any event this must unquestionably be so when lessor retains substantial controls over the use of the property, as the Government does here.

6. The Grant County brief (p. 8) quotes a clause of the mortgage which recites (R. 171) that it is "the intention * * * to convey hereby an absolute title, in fee simple". The granting clause of the mortgage states, however (R. 170), that Mortgagor conveys to the Mortgagee the "following described *leasehold* * * * to wit: All right, title, interest and privileges of the Mortgagor in and to that

certain ground Lease between the Secretary of the Air Force * * * and Mortgagor." (Italics supplied.) This demonstrates that no fee was being conveyed, and since petitioner as mortgagor possessed no fee title, none could have been.

The original form of the mortgage on file with the Clerk shows that the paragraph containing the recitation as to the intention to convey a fee simple was a part of a printed form lease devised for FHA use before the Wherry Act was passed, and that changes necessary to make the mortgage appropriate for a leasehold were inserted in typewriting.[8]

7. The lease provides that the property "as completed" shall be and become the property of the United States (R. 138). Respondents contend (Br., pp. 4, 15) that since "the units were only 78% completed" on March 10, 1952, they were not the property of the United States when the 1952 assessment was made.[9] The figure of 78% represents the proportion of the apartment units completed and ready for occupancy on March 10 (R. 112).[10] Title to these units, therefore, had vested in the United States by that date. The assessor admitted that his assessment represented the

8. On the original exhibit the printed words "real estate" in the granting clause are stricken and the word "leasehold" typed in above. At the top of the first page, it is indicated that the mortgage is on FHA "Form 4143-b (Revised June 1947).", which was two years before the Wherry Act was enacted. The form had obviously been prepared for use under the pre-existing Title VI of the Housing Act, which had nothing to do with leased property. It is to be noted that the lease refers to the mortgage as on the "leasehold estate." (R. 140.)

9. The assessor testified that "the assessment for property in Nebraska" is "from March the 10th to April the 20th", and that "In determining the value of improvements that are in the process of construction * * * I can use up until July 1st if I want to * * *." (R. 121.)

10. The remainder needed only such internal items as plumbing and painting, all of which were completed by June 6, 1952 (R. 111-113, 96).

"value of the buildings" (R. 121), and it is clear from his testimony as a whole (R. 121-123) that he assessed all of them, making some allowance for the fact that some were not finished. Respondents' argument at most would relate to the 22% not completed at that time. In any event, in 1953, when all the units had been completed, the assessor admitted that he assessed the complete project (R. 122). The declaratory judgment and injunction sought by plaintiffs and granted by the District Court related to the taxability of the property in question for future years, and not merely for 1952 (R. 7-8, 26).

8. Respondents assert that under the lease petitioner and not the Government get the insurance proceeds in case any of the housing units are destroyed by casualty. Paragraph 20 of the lease (R. 141-142) provides that the lessee will keep the buildings insured "in an amount to be determined by the Government, payable to the Lessee and any security holder, jointly as their respective interests may appear," that in the event of a partial loss the lessee shall restore the improvements, but that he need not do so in the event of complete destruction of any building, and that paragraph 20 as a whole shall be inoperative so long as the interests of the lessee be covered by a mortgage insured by the Commissioner.

9. Respondents assert that there is no competent testimony that the project rentals are cheaper than those for comparable housing elsewhere. They overlook the direct statement to that effect by Colonel Beck on page 50 of the record. See also R. 58.

10. Respondents state that for the year 1952 the average tax for each of the 611 units was $1.50 per month per unit. The average was substantially higher in 1953, after the project was completed. Since the decision of this Court will govern all similar projects throughout the nation, the significant fact is the average tax sought to be imposed on

such projects generally. In that connection, we call the Court's attention to the second paragraph of the Appendix to the *Memorandum for the United States as Amicus Curiae*, which reads as follows:

> "At present, there are 62 on-base projects at 34 locations (involving 22,341 units) being taxed,[11] and the amount of tax ranges from $28.00 per unit per month, or $336 per unit per annum, down to $.50 per unit per month; the average amount of tax is approximately $12.00 per unit per month."

The Grant County brief (p. 10) mistakenly asserts that the Project Analysis allowed for $13,904 annually for taxes, that this is close to the taxes actually assessed, and that "To uphold the tax would result in 26 cents per unit per month rental increase." This argument is based on a misunderstanding of the Record. The figure of $13,904 to which the Grant County brief refers appears in the FHA Project Analysis (R. 164) after the typewritten words "Cost of Street & Utility Maintenance". This phrase in turn appears after the printed words "Other special local taxes". The item does not represent taxes, however, but costs of maintenance borne by petitioner itself. The Record shows that petitioner maintains the streets and sewers within the project and that other utility services were provided by private companies (R. 103-107, 110). Since no local governmental unit provides these services, no local assessment could have been imposed for them.

This particular cost item was apparently placed where it was on the form, in a line which would otherwise have been blank, because there was no particular line upon which it should go. That it could not have referred to property

11. The Appendix to the Government's *Memorandum* notes that the taxes imposed on 32 of these projects are in litigation. We have been advised by the Department of the Air Force that a number of those not in litigation are waiting the results of test cases involving other projects in the same state.

taxes is demonstrated by the last item on the same page which states that:

> "Processed on the assumption that the project will not be subject to State, County, or School Property Tax. If such taxes are assessed rents will have to be adjusted accordingly."

Counsel for Sarpy County, who would be more familiar with the local situation than counsel in the State of Washington who have not previously participated in this case, have never suggested that the item in question represented "special local taxes", for no such taxes are imposed.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1955

No. 404

OFFUTT HOUSING COMPANY, a Corporation,

Petitioner,

vs.

COUNTY OF SARPY and ROBERT M. EBY, TREASURER OF COUNTY OF SARPY, NEBRASKA,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Nebraska

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IN THE

Supreme Court of the United States

October Term, 1955

No. 404

OFFUTT HOUSING COMPANY, a Corporation,

Petitioner,

vs.

COUNTY OF SARPY and ROBERT M. EBY, TREASURER OF COUNTY OF SARPY, NEBRASKA,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Nebraska

BRIEF OF RESPONDENTS IN OPPOSITION

Respondents pray that the petition for a Writ of Certiorari to the Supreme Court of Nebraska in the above entitled case be denied.

QUESTION PRESENTED

The United States leased to petitioner for 75 years land adjacent to an Air Base for the construction and operation of housing accommodations. The question presented is whether Respondents may collect from petitioner a tax on the interest of the petitioner in the build-

ings and on household appliances and office equipment owned by petitioner.

STATUTES INVOLVED

In addition to the statutes cited by the petitioner, the case also involves the following statutes and constitutional provisions which are set out in full in the appendix:

The Housing Amendments of 1955, Public Law No. 345, Ch. 783, Sec. 404, 84th Cong. 1st Sess., approved August 11, 1955, and the following Nebraska Constitutional and Statutory provisions:

Article VIII, Section 2, Constitution of the State of Nebraska, and Secs. 77-105, 77-201 and 77-1209, Nebr. R. R. S. 1943.

STATEMENT

Offutt Housing Company, a private, profit-seeking corporation, brought this action against the County of Sarpy, Nebraska, and its Treasurer, to have a 1952 tax assessment and levy on the interest of Offutt Housing Company in the Wherry Housing project adjacent to Offutt Air Force Base, declared void and to have future assessments and levies enjoined. The District Court held for the plaintiff and on appeal the Supreme Court of Nebraska reversed, holding:

"We, therefore, conclude that for the purpose of taxation under the provisions of Section 77-

1209 R. R. S. 1943, plaintiff was in fact and as a matter of law the owner of all the improvements, including the fixtures, appliances, equipment, furniture and other personal property used therein so long as his lease was in force and effect, all of which was taxable as personal property. TO CONCLUDE OTHERWISE WOULD PERMIT PLAINTIFF TO PERPETRATE A SHAM AND FRAUD UPON THE STATE AND ITS GOVERNMENT SUBDIVISIONS." (Emphasis supplied.)

Carl C. Wilson and two other persons of Omaha, Nebraska, on December 22, 1950, organized a perpetual, private Nebraska corporation for the purpose of providing housing for rent or sale by improving, operating, selling, mortgaging or leasing any real estate and personal property. The corporation was authorized to apply for and obtain from the Federal Housing Commissioner, mortgage insurance pursuant to the provisions of the National Housing Act as amended. Its authorized capital stock was $800,000.00, consisting of 80,000 shares of which there were 10 shares of preferred stock of a par value of $10.00 and 79,990 shares of common stock of a par value of $10.00, with a minimum capital requirement of $100,000.00. The profits of the corporation, after providing therefrom dividends of 50 cents per share per annum for the preferred stock, and all reserves, may be applied each year in payment of dividends to common stock holders. On the 29th of July, 1952, the Federal Housing Administration held 10 shares of preferred stock and Carl C. Wilson, Inc., held 25,000 shares of common stock.

Offutt Housing Company, a corporation, on the 18th of January, 1951, entered into a lease whereby the Sec-

retary of the Air Force, representing the United States of America, by authority of the Act of August 5th, 1947, 61 Stat. 775 and the Act of August 8, 1949, 63 Stat. 570 and to effectuate the purpose of Title VIII of the National Housing Act at a consideration of $100.00 per annum, leased to the Offutt Housing Company, a corporation, for 75 years, 63 acres of land (48 acres of which had been donated by the Omaha Chamber of Commerce, Douglas County, Nebraska) to be used for the purpose of erecting, maintaining and operating a housing project of 611 units, in accordance with plans submitted by the Air Force and approved by the Federal Housing Administration, reserving to the Government easements for water lines, electric lines, telephone lines and joint use of 2000 feet of road leading to the public roads of the County of Sarpy and State of Nebraska. Section 8 of the lease specifically provides:

> "That the Lessee shall pay to the proper authority, when and as same become due and payable, all taxes, assessments and similar charges which, at any time during the term of this lease, may be taxed, assessed or imposed upon the Government or upon the Lessee with respect to or upon the leased premises. In the event any taxes, assessments, or similar charges are imposed with the consent of the Congress of the United States upon property owned by the Government and included in this lease (as opposed to the leasehold interest of the Lessee therein), this lease shall be renegotiated so as to accomplish an equitable reduction in the rental provided above, which shall not be greater than the difference between the amount of such taxes, assessments, or similar charges and the amount of any taxes, assessments or similar charges which were imposed upon such Lessee with respect to his leasehold interest in the

leased premises prior to the granting of such consent by the Congress of the United States; * * *."

Offutt Housing further agreed in said lease to comply with all applicable laws; to keep the buildings and improvements in good order and repair and save the government harmless from failure in that respect and to keep them insured against fire at its own expense with loss payable to lessee and any security holder jointly as their interests may appear.

On First February, 1951, Offutt Housing Company mortgaged its leasehold situated in the County of Sarpy, State of Nebraska, in a certain ground Lease from the Secretary of Air Force together with the privileges and appurtenances to the same belonging and all of the rents, issues and profits which may arise or be had therefrom and all buildings and improvements of every kind and description now or hereafter erected, or placed thereon, including all fixtures and personal property owned by mortgagor attached or used in or about the building or buildings now erected or hereafter to be erected, in the amount of $4,949,100.00 to Manufacturers Trust Company of New York, which mortgage bore interest at 4% per annum. Offutt Housing Company in its mortgage agreed to pay monthly installments of $22,683.37 plus a sum sufficient to prevent delinquency of premium charges on mortgage insurance, ground rentals, tax assessments, water rents, fire and other hazard insurance premiums, and to pay all taxes levied upon mortgagee's interest in the improvements and upon the mortgage or debt secured thereby, excluding any income tax, state or federal, imposed on the mortgages.

Carl C. Wilson, Inc., constructed the 611 housing units for Offutt Housing Company and received $285,750.00 as compensation. Carl C. Wilson was the president of both corporations. On March 10, 1952, the assessment date, the project was 78% complete. The Units are equipped with household appliances owned by petitioner, which were originally encumbered by chattel mortgages to General Motors Acceptance Corporation and First National Bank of Omaha, in the sum of approximately $110,000.00.

The Federal Housing Administration's amended Project Analysis, dated January 24, 1951, estimated that Offutt Housing Company's net annual income from rentals, with 97 per cent occupancy, after payment of maintenance, operating expenses, and taxes, would be $326,798.00 and the gross $476,786.00 per year.

Carl C. Wilson, president of Offutt Housing Company, estimated the useful life expectancy of the buildings and improvements at about 35 years.

Military personnel and their families, numbering about 2400, occupy the housing. Rentals range from $89.25 to $51.25 per month. The maximum rental allowance received by military personnel occupying the project is $135.00 per month.

Subsequent to an opinion by the Attorney General of Nebraska and on failure of Offutt Housing Company to file a tax return, the assessor of Sarpy County, Nebraska, prepared and filed a 1952 assessment schedule valuing the property of the Offutt Housing Company at $825,685.00 upon an estimate that the improvements were 75% complete. A tax of $10,783.45 was levied. The as-

sessor also prepared and filed a 1953 assessment schedule in which he valued the property at $2,778,580.00 and assessed it at $1,389,290.00. This resulted in a tax levy of $15,865.69.

REASONS FOR DENYING THE WRIT

I.

There is no real conflict in the law. All of the cases cited as holding Wherry Housing projects not subject to taxation are decisions of trial courts. All courts of Last Resort of the States and all Federal Courts which have considered the question, so far as respondents have determined, have held such projects taxable. *Sheridanville, Inc. v. Borough of Wrightstown*, 125 Fed. Supp. 743; *Fort Dix Apartment Corp. v. Borough of Wrightstown*, No. 11512, decided August 23, 1955 (C. A. 3); *Meade Heights, Inc., v. State Tax Commissioner of Maryland*, 220 Md, 20, 95 A. 2d 280 (1953).

II.

Contrary to the assertion contained in the petition, this is a case in which the State and County Governments provide substantial services to the residents of the Wherry Housing Project. It is elementary that State Government and County Government in our American system provide services to residents of the community which are not available at any other level of government.

The some 2400 residents of the project involved herein frequently avail themselves of local governmental services furnished by the State of Nebraska and Sarpy

County. These people use our local courts for adoptions, guardianships, divorces and almost all other forms of action available to residents of Nebraska, generally. Neither the military establishment nor the Federal Courts afford a forum for many of the remedies and services which these persons necessarily require. The burden placed upon the Courts of Sarpy County is substantial.

Residents of this Wherry Housing Project use the office of the County Treasurer of Sarpy County to procure driver's licenses and licenses for their automobiles. They transfer title to automobiles in the office of the County Clerk. Here they record Conditional Sales contracts and Chattel Mortgages. Many of the documents involved in this action were filed with the Sarpy County Clerk. The Sarpy County sheriffs and the Nebraska Safety Patrol provide police protection when these people are off the Air Base. It is difficult to conceive of a single service of State and County government in Nebraska which is not offered to and received by the military tenants of this housing project.

This project is without the boundaries of any municipality or school district. Hence, the only taxes sought to be imposed are taxes for the support of State and County government. Generally speaking, the residents of this Wherry Housing Project pay no State or local taxes. Their personal property is exempted under the provisions of the Soldiers and Sailors Civil Relief Acts. They pay no tax on their motor vehicles. No service of government has come to respondent's attention which is not both available to and availed of by these people on the same basis as other citizens and residents of Sarpy

County. People create a great many more problems than the blankets which were involved in *Surplus Trading Co. v. Cook*, 281 U. S. 647. The equities are with the respondents.

III.

The United States government is not a party to this litigation. This is a lawsuit between the County of Sarpy on the one side and Offutt Housing Company, a Nebraska corporation organized for profit on the other. The United States did not deem the litigation of sufficient importance to intervene therein.

What will be the effect of the tax which has been levied? It has been estimated that this tax will amount to $2.00 per month on each of the 611 units in the project. The quarters allowance now being paid to the military tenants will still be in excess of the monthly rentals even after the tax is added to existing rentals. How could this affect the re-enlistment rate of the Air Force? The truth is that this petitioner is attempting to hide behind the clothing of the United States in an effort to escape taxation. The net result would be that the military tenant saves approximately $2.00 monthly at the expense of the citizens of Sarpy County and Nebraska who must pay for the governmental service which he receives.

The Government cannot complain if the tax otherwise sustainable increases government costs by its economic incidence. *James v. Dravo Contracting Co.*, 302 U. S. 134; *Alabama v. King & Boozer*, 314 U. S. 1.

In dealing with the argument that the tax would increase rentals, in *Sheridanville, Inc. v. Borough of*

Wrightstown, 125 F. Supp. 743; the Court said, "Since taxes are accepted as an inevitable universal burden, there would seem to be no reason why simply by the circumstances of governmental employment they (the military tenants) should enjoy immunity."

The force of petitioner's argument as to the importance of this question is further weakened by the Housing Amendments of 1955, Public Law No. 345, Ch. 783, 84th Cong. 1st Sess. approved August 11, 1955, which authorizes the Secretaries of the Armed Services to purchase Wherry Housing Projects under terms and conditions stated in the Act.

IV.

Payment of the tax here is resisted on the ground of exclusive jurisdiction and, as to the buildings, on the further ground of claimed government ownership. It is also urged by way of a last ditch stand that if there was any congressional consent to taxation, the respondents exceeded the limitations thereof.

It is contended that the United States has exclusive jurisdiction of the leased area and that *Surplus Trading Company v. Cook*, 281 U. S. 647, should control. This is a frail precedent from another era. The best that can be said for it is that it has not been specifically overruled. But if it were to be granted that exclusive jurisdiction did exist prior to the lease to the petitioner, there has been one specific and two implied waivers thereof, or, at least, waivers of the insulation against taxation that it is claimed results from exclusive jurisdiction.

It would seem clear to "anyone outside of a court of justice" (to borrow a phrase from Mr. Justice Holmes)

that the government should not be considered to have exclusive jurisdiction over something that it has leased to a private, profit-seeking corporation for a term of 75 years; that Congress by the act of authorizing such a lease impliedly waived the insulation against taxation that is contended for.

In another manner there is congressional waiver by implication. The property is made taxable if it is acquired by the Commissioner of the Federal Housing Administration. Act of Aug. 8, 1949, 63 Stat. 570, 12 U. S. C. A. 1748f. It would seem clear that Congress did not intend that a private, profit-seeking corporation should be in a more favorable position.

Further the lessee's interest in the property is specifically made subject to State and local taxation. Act of August 5, 1947, 61 Stat. 775, 5 U. S. C. A. 626s-6. *Fort Dix Apartments Corp. v. Borough of Wrightstown*, U. S. Court of Appeals, Third Circuit, No. 11512, decided August 23, 1955.

The government does not own the buildings involved in this litigation unless form is to control over substance. The form is the clause in the lease that the buildings become government property as completed. The substance is that for a period of 75 years on payment of a rental of $100.00 per year the lessee has the use and possession of the property and the right to all of the income and profits therefrom. The title of the government under similar arrangements has been termed a "paper one," *Sheridanville, Inc., v. Borough of Wrightstown, et al*, 125 Fed. Supp. 743 and a "bare title," *Gay v. Jemison*, 52 So. (2d) 137, Fla. The Supreme Court of Nebraska took a like

view. *Offutt Housing Co. v. County of Sarpy*, 160 Neb. 320. The paper title that the United States has to these buildings is not sufficient to prohibit their local taxation. *Baltimore Shipbuilding & Dry Dock Co. v. City of Baltimore*, 195 U. S. 375 and *S. R. A. v. State of Minnesota*, 327 U. S. 558.

Petitioner has made much of Mesta. *United States v. Allegheny County*, 322 U. S. 174. One view of Mesta is that there Pennsylvania was trying to tax government property by calling it the property of Mesta. This case is an exact opposite. Here an attempt is made to prevent the local taxation of private property by calling it the property of the government.

The 1947 Military Leasing Act contains a specific consent to the local taxation of all property of the lessee located on the leased premises. No other interpretations would carry out the intent of Congress which was to prevent unfair competition between private enterprises operating on government owned land and those operating on privately owned land. Congressional Record, Vol. 93, Part 8, pages 10491-92.

The property of the petitioner was properly taxed by respondents in conformity with applicable Nebraska statutes.

CONCLUSION

For the reasons stated the Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Housing Amendments of 1955, Public Law No. 345, Chap. 783, 84th Congress, 1st Session, approved August 11, 1955, Sec. 404:

Whenever the Secretary of Defense or his designee shall deem it necessary for the purposes of this title, he may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings to acquire by condemnation, any unimproved land, or (with the approval of the Federal Housing Commissioner) and housing financed with mortgages insured under the provisions of title VIII of the National Housing Act as in effect prior to the enactment of the Housing Amendments of 1955. Notwithstanding the provisions of any other law, the price paid for any such unimproved land or housing purchased by the Secretary under this or any other law shall be the fair market value of such land or housing as determined by the Secretary on the basis of an independent appraisal, and, in connection with any agreements to purchase such housing, the Secretary of Defense or his designee may assume, or purchase subject to, any such mortgage. Any such condemnation proceedings shall be conducted in accordance with the provisions of the Act of August 1, 1888 (25 Stat. 357), as amended, or any other applicable Federal statute. Before condemnation proceedings are instituted pursuant to this action, an effort shall be made to acquire the property involved by negotiation unless, because of reasonable doubt as to the identity of the owner or owners, because of the large number of persons, the effort to acquire by negotiation would involve, in the judgment of the Secretary, such delay in acquiring the property as to be contrary to the interest of national defense. In any condemnation proceeding instituted pursuant to this section, the Court shall not order the party in possession to surrender possession in advance of final judgment unless a declaration of taking has been

filed, and a deposit of the amount estimated to be just compensation has been made, under the first section of the Act of February 26, 1931 (46 Stat. 1421), providing for such declarations. Unless title is in dispute, the courts, upon application, shall promptly pay to the owner, at least 75 per centum of the amount so deposited, but such payment shall be made without prejudice to any party to the proceeding. Property acquired under this section may be occupied, used, and improved for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended.

Article VIII, Section 2, Constitution of the State of Nebraska:

EXEMPTION OF PROPERTY FROM TAXATION. The property of the state and its governmental subdivisions shall be exempt from taxation. The Legislature by general law may exempt property owned by and used exclusively for agricultural and horticultural societies, and property owned and used exclusively for educational, religious, charitable or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user. Household goods of the value of two hundred ($200.00) dollars to each family shall be exempt from taxation. The Legislature by general law may provide that the increased value of land by reason of shade and ornamental trees planted along the highway shall not be taken into account in the assessment of such land. No property shall be exempt from taxation except as provided in this section. (Amended, 1920.)

Sec. 77-105 Nebr. R. R. S. 1943:

"TANGIBLE PROPERTY," "INTANGIBLE PROPERTY," defined. The term "tangible property" includes all personal property possessing a

physical existence, but excluding money. The term "intangible property" includes all other personal property, including money.

Sec. 77-201 Nebr. R. R. S. 1943:

PROPERTY TAXABLE; ACTUAL VALUATION; BASIS OF ASSESSMENT. All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value.

Sec. 77-1209 R. R. S. 1943:

PERSONAL PROPERTY; IMPROVEMENTS ON LEASED PUBLIC LANDS; WHERE LISTED AND ASSESSED. All improvements put on leased public lands shall be assessed to the owner of such improvements as personal property, together with the value of the lease, and listed and assessed as such in the place where the land is situated. The taxes imposed on such improvements shall be collected by levy and sale of the interest of such owner, the same as in all other cases of collection of taxes on personal property, or by suit in the name of the county against such owner.

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FILED
MAR 26 1956
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In the
Supreme Court of the United States

October Term, 1955

No. 404

OFFUTT HOUSING COMPANY, A Corporation,
Petitioner,

vs.

COUNTY OF SARPY and ROBERT M. EBY, TREASURER OF COUNTY OF SARPY, NEBRASKA,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

BRIEF FOR RESPONDENTS

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Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

Respondents in 1952, under the authority of Nebraska law, levied a tangible, personal property tax for state and county governmental purposes against housing units, household appliances and office equipment it claimed were owned by the petitioner. The property taxed was located on land leased by petitioner from the United States.

The questions presented are:

(1) Whether the United States has exclusive jurisdiction of the leased area

(a) Allied to this is the question whether exclusive jurisdiction, if it exists, has the legal effect of precluding the tax here absent consent of congress;

(2) If yes, whether Congress has consented to the local taxation of privately owned personal property located on the leased area;

(3) If privately owned personal property located on the leased area is subject to local taxation, whether the housing units are the property of petioner or whether they are the property of the United States to such an extent that local taxation thereof is prohibited.

Statutes and Constitutional Provisions Involved

The Wherry Military Housing Act of August 8, 1949, 61 Stat. 570, gave no new authority to lease government property. The relevant portions of this Act are set out in the Appendix at p. 26.

The lease here was made under the authority of the Military Leasing Act of August 5, 1947, 61 Stat. 774. Sections 1 and 6 of this Act (Appendix p. 22) show the authorization to lease and consent to taxation provisions.

Article I, Section 8, Clause 17, of the Constitution of the United States is pertinent on the question of exclusive jurisdiction.

In the Act of May 19, 1952, 66 Stat. 79 is a table showing the basic allowance to members of the Armed Services for quarters (Appendix p. 22).

Nebraska statutory provisions involved are the following:

Section 77-1201, R. R. S. 1943 (Appendix p. 24) establishes that the assessment date for personal property in 1952 was March 10.

Section 72-601, R. R. S. 1943 (Appendix p. 24), implements Article I, Section 8, Clause 17 of the Constitution of the United States by consenting generally to the acquisition by the United States of land in Nebraska by purchase.

Laws of Nebraska, 1887, Ch. 83 (Appendix p. 25), specifically cedes jurisdiction of the land in the military reservation of Fort Robinson.

—o—

STATEMENT

The statement of petitioner is accepted by respondent subject to the correction of inaccuracies and omissions as follows:

Whether the leased area is in the exclusive jurisdiction of the United States is one of the questions for decision and cannot be now stated as a fact.

The lease provides that the petitioner and not the government gets the insurance proceeds in case any of the housing units are destroyed by casualty (Ex. 4, R. 141-142; 28).

There is no competent testimony that the rentals for these units are cheaper than the rentals for comparable housing elsewhere (R. 46).

The services that the United States furnishes to the project are furnished on a reimbursable basis (Ex. 4, R. 137-38, 28; Ex. 14, R. 167, 89; Ex. 18, R. 188, 110).

Only taxes for county and state governmental purposes were levied and no city or school district taxes are involved (R. 2).

The military tenants in these housing units receive "an allowance for querters" (R. 58).

The housing units were 78% completed on the assessment date in 1952, March 10 (R. 112).

Petitioner on July 28, 1953, claimed in writing to be the owner of the housing units (Ex. 16, R. 182, 102). Likewise it asserted ownership of the buildings by attempting to mortgage them (Ex. 15, R. 170, 101).

The Federal Housing Administration receives a premium for insuring the mortgage (R. 94).

SUMMARY OF ARGUMENT

I.

For two reasons the respondents contend the United States does not have exclusive jurisdiction of the area in question:

A. Part of the land was donated to the United States. Cession does not operate without consent to acquisition. The State of Nebraska has not consented.

B. The fact that the housing units are for the present occupied by employees of the United States does not make them "Needful Buildings" under Article I, Section 8.

II.

The rule that Federal enclaves are islands within a state and that private personal property thereon ipso

facto is immune from state taxation belongs to an earlier era of rigid adherence to the doctrine of intergovernmental tax immunity.

III.

Any immunity against taxation that results from exclusive jurisdiction has been waived.

A. The Military Leasing Act of 1947 contains a specific congressional consent to the local taxation of the property of petitioner on the leased area.

B. Congress has impliedly waived exclusive jurisdiction by authorizing the 75-year lease of the area.

C. Congress has impliedly waived exclusive jurisdiction by providing that the property is taxable if acquired by the Commissioner of the Federal Housing Administration. The petitioner clearly should not be preferred to the Commissioner.

IV.

The property is not government property.

A. Admittedly the office equipment and household appliances belong to petitioner.

B. The United States has at most a "Paper Title" to the housing units. The units are the property of the petitioner unless form is to control over substance.

V.

The tax is not against the United States.

A. Neither directly nor indirectly will the United States pay the tax if sustained.

B. Every increase in the price of commodities and services decreases the net income of government personnel. But this does not authorize the government to prohibit the increase. The tax here may result in an increase in the rent of government personnel but that is not sufficient to condemn it.

VI.

The United States is paid for sewage disposal and other usual governmental services it furnished the petitioner. Respondents are entitled to fare as well.

ARGUMENT

I.

The United States does not have exclusive jurisdiction of the land leased.

A. Part of the Land Was Not Purchased.

Some forty-eight acres of the leased land were donated to the United States by the Omaha Chamber of Commerce, Inc. Article I, Section 8, Clause 17 of the Constitution of the United States provides that the Congress shall have the power "To exercise exclusive legislation in all Cases whatsoever * * * over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Dock-yards, and other Needful Buildings,"

The consent of the Legislature of Nebraska to the acquisition here is supposed to be contained in the general Nebraska consent statute. Sec. 72-601, R. R. S. 1943 (Neb.) (Appendix p. 24.)

Clearly it would seem that the Legislature of Nebraska consented only to an acquisition by purchase. Purchase in this connection has been held to mean to acquire for a price. *Crook v. Old Point Comfort Hotel Company*, 54 Fed. 604. So it is submitted that this Court could properly hold that as to the donated land, the jurisdiction of the State of Nebraska is concurrent with that of the United States. If this result is reached, then are the respondents by taxing the petitioner, impairing any effective use being made of the property by the United States? It is submitted that they are not. The United States is simply leasing the property to a private corporation. The United States will receive no less rent if the tax is sustained.

The case of *United States v. Unzeuta*, 281 U. S. 138 (1930), cited by petitioner (Br. 20), has no bearing on this proposition as the land involved in that case was ceded under a specific cession statute, and the cession was of the specific land contained in the military reservation of Fort Robinson. The cession was made without regard to the manner in which th United States had acquired title to the Fort Robinson land (Laws of Nebraska, 1887, Chapter 83, Appendix p. 25). It should be noted that the general consent statute, supra, was an Act of 1883. It may well be that the very reason that the 1887 specific cession statute as to the Fort Robinson land was thought to be necessary was because that land was not purchased.

B. The Housing Units Are Not Forts, Magazines, Arsenals, Dock-yards and Other Needful Buildings.

For the time being the housing units are presumably occupied exclusively by Air Force personnel. But this need not always be. The lease permits their occupancy under certain situations exclusively by nonmilitary tenants. Should this come to pass, the true status of these units would be highlighted. They are merely private housing units operated for profit by a private corporation and it is fallacious to use the employment of their occupants as a yardstick for their classification.

But there is authority for the proposition that even though occupied exclusively by military personnel, such units are not within the constitutional classification. *Tampa Bay Garden Apartments, Inc. v. Gay*, 55 So. 2nd 739. There, as here, a private corporation had constructed housing units on government land which units it was renting to military personnel. The State of Florida imposed a sales tax on the rentals and the tax was resisted on the grounds that the housing units were on land within the exclusive jurisdiction of the United States. The Court held the tax to be valid and ruled that such units did not come within the constitutional classification of "Forts, Magazines, Arsenals, Dock-yards and Other Needful Buildings."

II.

Exclusive jurisdiction should not preclude the tax here.

In his dissenting opinion in *Pacific Coast Dairy, Inc. v. Department of Agriculture of California*, 318 U. S. 285, Mr. Justice Frankfurter stated:

> "The power given to Congress by Article I, Section 8 of the Constitution, to 'exercise exclusive legislation' over federal enclaves is not so tyrannical as to preclude in law what good sense requires."

Respondents respectfully suggest that the doctrine of *Surplus Trading Company v. Cook*, 281 U. S. 647, seems strangely alone in an era when there is left but remnants of former doctrines of inter-governmental tax immunity.

III.

Congress has consented to the imposition of the tax.

A. Specifically in the 1947 Military Leasing Act.

The Wherry Military Housing Act, Act of August 8, 1949, 63 Stat. 570 (Appendix p. 26), gave no new authority to lease government property. It provided in part:

> "Whenever * * * it is desirable to lease real property within the meaning of the act of August 5, 1947 (61 Stat. 774), to effectuate the purposes of this title, the Secretary concerned is authorized to lease such property under the authority of said Act * * *."

So the lease here was in fact made under authority granted in the Military Leasing Act of 1947, Act of August 5, 1947, 61 Stat. 774 (Appendix p. 22). The first sentence of Section 6 of the 1947 Act is as follows:

> "The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to state or local taxation."

Respondents submit that this is a consent by Congress to the taxation of the property of the petitioner. *Fort Dix Apartments Corp. v. Borough of Wrightstown*, 225 F 2nd 473; *Meade Heights, Inc. v. State Tax Commis-*

sioner, 95 At. 2nd 280. Such also was the holding below.

The first sentence of the opinion in the Meade Heights case states that housing units were constructed on land "over which the Federal Government has exclusive jurisdiction." The lease in that case provided that the housing units remained the property of Meade Heights, Inc., unless not removed at the termination of the lease. Otherwise the facts in that case and this case are almost identical. Maryland taxed the buildings to Meade Heights, Inc., and the tax was sustained. The Court held that the provisions of the 1947 Military Leasing Act were a consent by Congress to such taxation:

> "In the instant case Congress has definitely consented to the taxation of lessee's interest, whatever that may be."

There is a provision in the 1947 Leasing Act which, with exceptions, limits the term of leases made thereunder to five years. Also, leases made thereunder are to be revocable in case of national emergency. The Wherry Act provides that leases for housing under the authority of the 1947 Act are to be made without regard to these two limitations. This clearly demonstrates that Congress in drafting the Wherry Act carefully reviewed the 1947 Act and made inapplicable any provisions thereof that it did not want to apply to leases made for housing. It is noteworthy that it did not say that Section 6 of the 1947 Act was not to apply. The conclusion must be that it does.

Petitioner argues that Section 6 of the 1947 Act is merely a consent to the taxation of the value of leasehold interests in government property located on land

without the exclusive jurisdiction of the United States. It can be very easily demonstrated that this analysis is incorrect. Petitioner in its brief has set out sufficient of the debates in committee to show that there was general agreement that any immunity from taxation should be waived so that the prospective lessees would be on the same footing taxwise as their competitors operating on nonfederal property. The objective sought was the avoidance of unfair competition. Certainly this evil would have been as prevalent where there was exclusive jurisdiction as where there was not. Also unfair competition would not be avoided by permitting the taxation of the value of the leasehold only and leaving lessee's property brought on the leased premises immune.

Section 6 of the 1947 Act is a consent to the taxation of the value of the leasehold of government-owned property and to the taxation of property of lessee on the leased premises—whether there is exclusive jurisdiction or whether there is not. This is the only possible interpretation that can be made if the objective sought by Congress is to be carried out.

B. Impliedly by Authorizing the Lease.

Assuming that the United States prior to the leasing to Offutt Housing Company of the land upon which the housing units were erected, had exclusive jurisdiction of the leased area, it is the position of respondents that such exclusive jurisdiction does not now exist. Petitioner relies upon *Surplus Trading Company v. Cook*, 281 U. S. 647. That case involved a quantity of blankets which were stored in an army storehouse within Camp Pike, Ar-

kansas. The blankets had been purchased by Surplus Trading Company, a New York concern, and Arkansas attempted to tax them as personal property. The Supreme Court of Arkansas upheld the tax, and this Court reversed. This Court there held that Article I, Section 8, Clause 17 of the Constitution of the United States prevented the taxation of private personal property located within the confines of a Military Reservation. This case differs from Surplus Trading Company v. Cook, in that in the Surplus Trading Company case, no lease of the land to a private corporation was involved.

It seems clear to respondents that the United States government should not be considered to have exclusive jurisdiction over something it has leased to a private, profit-seeking corporation for a term of seventy-five years; that Congress by the act of authorizing such a lease impliedly waived the immunity against taxation that is contended for.

A somewhat analogous situation arose in the case of *S. R. A. v. Minnesota*, 327 U. S. 558. That case involved realty conveyed to the United States in 1867 as a site for a building to house a post office, a customs office and offices for various departments and agencies of the United States. The building was eventually vacated and the property sold in 1939 by the Director of Procurement of the Department of the Treasury under the authority of an act for the disposal of surplus Federal real estate.

It was purchased on public sale and improved by S. R. A. who was in full possession with right of user under an executory contract of sale between it and the

United States at the time of the levy of the tax. The contract provided for a cash payment and annual installments. Possession by S. R. A. was provided for so long as it met the terms of the contract, and if it defaulted, the contract provided for repossession by the United States, retention of the purchase price paid, and the United States was authorized to resell the realty and recover any resulting deficiency from S. R. A. All obligations due under the contract had been met. The major portion of the contract price had not fallen due, and was unpaid. The contract permitted leases to others in subordination to the rights of the United States. The contract required the United States to execute and deliver a quit claim deed for the realty to S. R. A. upon its completion of the requirements of the contract. The title remained in the United States.

The State had ceded jurisdiction over the realty in accordance with the exclusive legislation clause of the United States Constitution. Article I, Section 8, Clause 17.

With the ownership of the property in the status described, Minnesota levied taxes for general and special purposes on the property. This Court sustained the tax. There were no specific words in the contract with S. R. A. which were intended to retain sovereignty in the United States. There was no express retrocession by Congress to Minnesota such as sometimes occurs. There was no requirement in the act of cession for return of sovereignty to the state when the property was no longer used for Federal purposes. This Court said:

> "In the absence of some provision, a transfer of property held by the United States under state cessions pursuant to Article 1, Section 8, Clause 17, of the Constitution would leave numerous isolated islands of Federal jurisdiction, unless the unrestricted transfer of the property to private hands is thought without more to revest sovereignty in the state. As the purpose of Clause 17 was to give control over the site of governmentals operations to the United States, when such control was deemed essential for Federal activities, it would seem that the sovereignty of the United States would end with the reason for its existence and the disposition of the property. We shall treat this case as though the government's unrestricted transfer of property to non-Federal hands is a relinquishment of the exclusive Legislative power. Recognition has been given to this result as a rule of necessity. If such a step is necessary, Minnesota showed its acceptance of a supposed retrocession by its levy of a tax on the property. Therefore, when petitioner entered into possession under its contract of purchase, the taxed property by the transfer became subject to the territorial jurisdiction of Minnesota."

If, then, the execution by the United States of the executory contract of sale reserving title in the United States worked a retrocession and gave the State territorial jurisdiction to tax, by the same token the execution by the United States of a seventy-five-year lease to Offutt Housing Company was a relinquishment of the exclusive legislative power which it is claimed gives immunity to this petitioner.

It is particularly noteworthy that no express retrocession by Congress was deemed necessary in S. R. A. vs Minnesota, supra. Petitioner insists that such is necessary (Br. 23-26-28-32-34). Also in *Fort Leavenworth*

Railroad Company v. Lowe, 114 U. S. 525, this Court said:

> "It (exclusive jurisdiction) is necessarily temporary, to be exercised only so long as the places continue to be used for the public purposes for which the property was acquired or reserved from sale. When they cease to be thus used, the jurisdiction reverts to the State."

C. Impliedly by Providing That the Acquisition of the Property by the Commissioner of Federal Housing Administration Should Not Render It Nontaxable.

This was the basis for the decision in *Sheridanville, Inc., v. Borough of Wrightstown*, 125 Fed. Supp. 743. The argument is that it could not have been the intention of Congress that the Commissioner of the Federal Housing Administration, in the event he should be obliged to take over the property, would be in a less preferred position with regard to local taxation than a private corporation such as the petitioner.

IV.

The tax was not imposed on property of the United States.

A. The Office Equipment and Household Appliances are Admittedly Owned by the Petitioner.

B. The Meager Interest of the United States in the Housing Units Is Not Sufficient to Prohibit the Taxation Thereof to Their Full Value.

On the assessment date in 1952, March 10,[1] the units were only 78% completed, and for that reason, if for no other, were not the property of the United States.

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1 77-1201, R. R. S. 1943 (Appendix p. 24).

Projects similar to this have been constructed throughout the country. A standard lease form was developed. It first provided (See *Meade Heights, Inc. v. State Tax Commissioner*, supra) that the housing units remained the property of the lessee removable by it at the expiration of the lease. After the decision in that case, the standard lease form was amended to provide (as the lease does here) that the housing units as completed become the property of the lessor. Obviously this change in the lease form was made to create a semblance of government ownership in the hope that local taxation could be avoided in that manner.

Respondents submit that to whom these housing units belong depends upon the intent of Congress as manifested in its Legislative Acts and not upon the intent of a draftsman in the Pentagon. On this the debates on the Wherry Housing Legislation are enlightening:

> "Mr. Monroney: 'It is strictly a private enterprise bill in which public construction is moved out and the whole matter is turned over to private enterprise.'
>
> "Mr. Johnson: ' * * * Here is the general plan we are working on in this bill * * *. Every person in the Army above the rank of Corporal gets an allowance for rent. * * * We propose to lease pieces of land to a contractor and allow him to build a house on that land. Then he is permitted to rent the house * * *. The occupant then pays the contractor, in substance, the commutation of rent that he gets which goes as an installment to pay on the house. In other words * * * we propose to have contractors build houses on military installations and pay the rental allowance provided by law for service personnel in the form of rent to the contractor, so that in 30 years * * * the house will be paid out

* * *. When the installments have been paid out to the contractor *the house and land become the property of the government.*'" (Emphasis supplied.) Congressional Record, Volume 95, Part 7, Pages 9683 ff., debate on Chapter 403, P. L. 211, Wherry Housing Act.

The President of the lessee corporation estimated the useful life of the building at 35 years, and stated: "I have always considered that any building that was 75 years old was not worth maintaining any farther than that." (R. 113)

The proceeds of the hazard insurance in case of loss are payable to lessee and not to the United States.

The lessee corporation in Exhibit 16 (R. 182, 102) asserted ownership of the housing units and in Exhibit 15 (R. 170, 101) attempted to mortgage them.

Personnel of the grade O-8 with dependents who live in this project, if any, draw a basic allowance for quarters of $171.00 per month. Over a period of seventy-five years, the united States under this arrangement would pay out $153,900.00 to an O-8 to live in a unit not costing in excess of $9,000, and which it is contended the United States owns. Yet in spite of this, petitioners state that these projects were constructed "at slight cost to the government" and were constructed under this arrangement as a matter of "government fiscal economy."

The title of the government under similar arrangements has been termed a "paper one," *Sheridanville, Inc., v. Borough of Wrightstown, et al.*, 125 Fed. Supp. 743, and a "bare title," *Gay v. Jemison*, 52 So. (2nd) 137 (Fla.). The Court below took a like view. *In Gay v. Jemison*, supra, the Court said:

> "Bearing in mind what we consider the evident intent of the Congress of the United States, and construing the language of the contract between the government of the United States and the lessee, we cannot arrive at the chancellor's conclusion that this housing project, when completed, will be a public work owned by the United States."

The feeble and meager interest the United States has in the housing units is not sufficient to prohibit their taxation. A substantial interest by way of reversion in dry-docks in favor of the United States and the retention of legal title by the United States of property sold under contract did not prohibit the taxation of these properties. *Baltimore Shipbuilding & Dry Dock Co. v. City of Baltimore*, 54 Atl. 623, 195 U. S. 375; *S. R. A. v. State of Minnesota*, 327 U. S. 558; *New Brunswick v. United States*, 276 U. S. 547.

In *United States v. Allegheny County*, 322 U. S. 174, this Court said:

> "We have held that where private interests in property were so preponderant that all the Government held was a naked title and a nominal interest, the whole value was taxable to the equitable owner."

Certainly if the United States ever had a naked title to anything it has such a title in the housing units here. The United States will be out of possession for 75 years and by that time there will be no buildings.

V.

The United States will not pay the tax if sustained.

A. The Tax Is Levied Against Petitioner.

The respondents made no attempt to tax the land which admittedly is owned by the United States. It did

not attempt to tax the value of the ground lease. It taxed only the personal property of petitioner. If the tax is sustained, it will have to be paid from the funds of the petitioner. In no way, directly or indirectly, is the tax against the United States.

B. That Indirectly, the Net Income of Government Personnel May Be Lessened by the Tax Does Not Condemn It.

The military personnel tenants who live in this project receive an allowance for quarters. This varies from $51.30 a month to $171.00 a month, depending on grade. Act of May 19, 1952, 66 Stat. 79 (Appendix p. 22). The tax here was $10,783.00. There are 611 units. So the tax for 1952 was about $18.00 per unit or $1.50 per month per unit.

If the tax is sustained and a rental increase is made because of this, the tenants will have to use a small additional part of their allowances with which to pay rent. They will have less net income. This same result would come if any of their other costs of living were increased. The adequacy of their salaries is a matter for Congress. The argument seems to be that Congress has not made adequate provision and that the respondents must assume a share of the burden.

VI.

Substantial services of Government are furnished to petitioner and its tenants.

The petitioner and its tenants have availed themselves of the services furnished by the State of Nebraska and Sarpy County. As stated in *Sheridanville, Inc. v. Borough of Wrightstown*, supra, it is true that there must

be a rendition of services to support a tax, but the fact that the resulting benefits are unequally shared does not invalidate the tax. *Thomas v. Gay*, 169 U. S. 264. The some 2400 people inhabiting this project create a great many more problems for Nebraska and Sarpy County than the blankets which were involved in *Surplus Trading Co. v. Cook*, supra.

Study of the project analysis (Ex. 13, R. 163, 87) will disclose that the FHA insured mortgage on the housing units was for 90% of the cost of the construction *as estimated by the sponsor*. Insuring a mortgage for 90% of what a prospective borrower says something will cost seems indeed a curious way to conduct the government's business. But that is not all. Included in this estimate is a fee to the builder of $285,750.00. The builder corporation, Carl C. Wilson, Inc., and the sponsor corporation, Offutt Housing Company, had the same president and were apparently for all practical purposes one and the same. The project analysis further shows that the petitioner expects to receive a gross annual income from the project of $476,786.00.

With this background on its part, the petitioner has the temerity to suggest that the very modest taxes here, if collected, would result in a raid on the federal treasury—a windfall. After it and its tenants have for five years used every service of government that the County of Sarpy and the State of Nebraska provide, petitioner now, almost arrogantly, it would seem, belittles the importance of such services and the cost of supplying them. It states that no school facilities are furnished by respondents. The record is clear that no taxes were levied for such purpose. It states that sewage disposal, water

and fire protection are provided by the United States. Here again the record is clear that no tax was levied for the furnishing of such services. The implication is that such services are furnished by the United States free of charge. This is not true. The United States is paid for any such services it furnishes. If the United States and petitioner are substantially one and the same, as contended by petitioner, why does the United States not furnish free water, free sewage disposal and free fire protection for this project? How can petitioner seriously contend that it and its tenants should have free use of the courts, the highways and the institutions of Nebraska, because of some claimed affinity with the United States? The United States treats petitioner like a stranger and charges it for any of the services of government that the United States provides.

CONCLUSION

For the foregoing reasons the judgment of the court below should be sustained.

Respectfully submitted,

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APPENDIX

1. Act of May 19, 1952, 66 Stat. 79, 37 U. S. C. 252 (f).

"Members of the uniformed services entitled to receive a basic allowance for quarters pursuant to this section shall be entitled to receive a basic allowance for quarters at the following monthly rates according to the pay grade to which assigned or in which distributed for basic pay purposes:

Pay grade	With dependents	Without dependents	Pay grade	With dependents	Without dependents
O-8	$171.00	$136.80	O-2	$94.20	$77.10
O-7	171.00	136.80	O-1	85.50	68.40
O-6	136.80	119.70	W-4	119.70	94.20
O-5	136.80	102.60	W-3	102.60	85.50
O-4	119.70	94.20	W-2	94.20	77.10
O-3	102.60	85.50	W-1	85.50	68.40

Pay grade	Not over 2 dependents	Over 2 dependents
E-7	$77.10	$96.90
E-6	77.10	96.90
E-5	77.10	96.90
E-4	77.10	96.90

Pay grade	1 dependent	2 dependents	Over 2 dependents
E-3	$51.30	$77.10	$96.90
E-2	51.30	77.10	96.90
E-1	51.30	77.10	96.90

2. Military Leasing Act of August 5, 1947, 61 Stat. 774, 5 U. S. C., Sec. 626 S-3.

"[Section 1] * * * Whenever the Secretary of War or the Secretary of the Navy [or the Secretary of the Air Force] shall deem it to be advantageous to the Government he is authorized to lease such real or personal property under the control of his Department as is not surplus to the needs of the Department within the meaning of the Act of October 3, 1944 (58 Stat. 765), and is not for the time required for public use to such lessee or lessees and upon such terms and conditions as in his judgment will promote the national defense or will be in the

public interest. Each such lease shall be for a period not exceeding five years unless the Secretary of the Department concerned shall determine that a longer period will promote the national defense or will be in the public interest. The Secretary of the Department concerned may include, among other terms and conditions in the lease, a right of first refusal in the lessee to purchase the property in the event of the revocation of the lease in order to permit sale thereof by the Government, but this section shall not be construed as authorizing the sale of any property unless the sale thereof is otherwise authorized by law. Each such lease shall contain a provision permitting the Secretary of the Department concerned to revoke the lease at any time, unless the Secretary shall determine that the omission of such provisions from the lease will promote the national defense or will be in the public interest. In any event each such lease shall be revocable by the Secretary of the Department concerned during a national emergency declared by the President. Notwithstanding section 321 of the Act of June 30, 1932 (47 Stat. 412; U. S. C., title 40, sec. 303b), or any other provision of law, any such lease may provide for the maintenance, protection, repair, or restoration by the lessee, of the property leased or of the entire unit or installation where a substantial part thereof is leased, as a part or all of the consideration for the lease of such property. In the event utilities or service shall be furnished by the Department concerned to the lessee in connection with any lease, payments for utilities or services so furnished may be covered into the Treasury to the credit of the appropriation or appropriations from which the costs of furnishing any such utilities or services to the lessee was paid. Except as otherwise hereinabove provided, any money rentals received by the Government directly under any such lease shall be deposited and covered into the Treasury as miscellaneous receipts. The authority herein granted shall not

apply to oil, mineral, or phosphate lands. The Secretary of War or the Secretary of the Navy, as the case may be, shall submit to the Congress on the 1st day of January and the 1st day of July of each year, following the enactment of this law, a report of all leases entered into in accordance with the provisions of this Act.

"Sec. 6. The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of this Act shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated."

3. Sec. 72-601, R. R. S. 1943 (Neb.).

"The consent of the State of Nebraska is granted to the United States of America to purchase such grounds as may be deemed necessary in any city or incorporated town in the State of Nebraska, for the erection thereon of buildings for the accommodation of the United States circuit and district courts, post offices, land office, mints, or any other government office, and also for the purchase by the United States of such other lands within the State of Nebraska as the agents or authorities of the United States may from time to time select for the erection of forts, magazines, arsenal and other needful buildings."

4. Sec. 77-1201, R. R. S. 1943 (Neb.).

"A complete list of all personal property held or owned on March 10 of the year in which the assessment is being made, except motor vehicles, shall be made as follows:

"(1) Every person of full age and sound mind, being a resident of this state, shall list all his money, credits, bonds or stocks, shares of joint stock or other companies, if the capital stock of such company is

not assessed in this state, money loaned or invested, annuities, franchises, royalties and all other personal property, except motor vehicles;

"(2) He shall also list all money and other personal property invested, loaned or otherwise controlled by him as agent or attorney, or on account of any other person or persons, company, or corporation whatsoever and all money deposited subject to his order, check or draft, and credits due from any person or persons, body corporate or politic, whether in or out of the county;

"(3) The property of a minor child shall be listed by the following: (a) His guardian; (b) if he has no guardian, by his father, if living; (c) if his father is not living, by his mother, if living; and (d) if neither his father nor mother be living, by the person having such property in charge;

"(4) The property of any other person under guardianship, by his guardian or, if he has no guardian, by the person having charge of such property;

"(5) The property of a wife, by her husband, if he is of sound mind; if not, by herself;

"(6) The property of a person for whose benefit it is held in trust, by the trustee; of the estate of a deceased person, by the executor or administrator;

"(7) The property of corporations whose assets are in the hands of a receiver or receivers, by such a receiver or receivers;

"(8) The property of corporations, by the president or the proper agent or officer thereof;

"(9) The property of a firm or company, by a partner or agent thereof; and

"(10) The property of manufacturers and others in the hands of an agent, by and in the name of such agent, as merchandise.

5. Laws of Nebraska, 1887, Ch. 83.

"Section 1. That the jurisdiction of the state of Nebraska in and over the military reservations known as Fort Niobrara and Fort Robinson be and the same are hereby ceded to the United States.

"Provided, That the jurisdiction hereby ceded shall continue no longer than the United Sttaes shall own and occupy said military reservations."

6. The Wherry Military Housing Act of August 8, 1949, 63 Stat. 570, 12 U. S. C. Sec. 1748.

"Sec. 805. Whenever the Secretary of the Army, Navy, or Air Force determines that it is desirable to lease real property within the meaning of the Act of August 5, 1947 (61 Stat. 774), to effectuate the purposes of this title, the Secretary concerned is authorized to lease such property under the authority of said Act upon such terms and conditions as in his opinion will best serve the national interest without regard to the limitations imposed by said Act in respect to the term or duration of the lease, and the power vested in the Secretary of the Department concerned to revoke any lease made pursuant to said Act in the event of a national emergency declared by the President shall not apply. Whenever the Secretary of the Army, Navy, or Air Force determines it to be in the interest of national defense, he is hereby authorized to sell, transfer, and convey at fair value (as determined by him), for use under this title, all or any right, title, and interest in any real property under his jurisdiction, notwithstanding any limitations or requirements of law with respect to the use or disposition of such property. The authority conferred by this section shall be in addition to and not in derogation of any other power or authority of the Secretary of the Army, Navy, or Air Force.

* * * * * * *

"Sec. 807. Nothing in this title shall be construed to exempt any real property acquired and held

by the Commissioner under this title from taxation by any State or political subdivision thereof, to the same extent, according to its value, as other real property is taxed."

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No. 404

In the Supreme Court of the United States

OCTOBER TERM, 1955

OFFUTT HOUSING COMPANY, A CORPORATION,
PETITIONER

v.

COUNTY OF SARPY AND ROBERT M. EBY, TREASURER OF COUNTY OF SARPY, NEBRASKA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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COUNTY OF SARPY AND ROBERT M. EBY, TREASURER OF COUNTY OF SARPY, NEBRASKA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The United States respectfully urges the Court to grant the petition for a writ of certiorari which has been filed in this case.

The issue which this case poses is one of importance to the United States. The litigation affects the welfare of the personnel of its Armed Forces, and the Judge Advocate Generals of the Army and the Air Force and the General Counsel of the Navy have requested the Solicitor General to urge this Court to review the decision of the Supreme Court of Nebraska. Further, the case is important to many of the states since it concerns the proper scope and administration of their taxing laws.

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 404

OFFUTT HOUSING COMPANY, A CORPORATION, PETITIONER

v.

COUNTY OF SARPY AND ROBERT M. EBY, TREASURER OF THE COUNTY OF SARPY, NEBRASKA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The Government shares petitioner's view that neither the language, purpose nor legislative history of the Act of August 8, 1949, c. 403, 63 Stat. 570, known as the Wherry Act, discloses a Congressional purpose to permit state or local taxation of military housing projects constructed upon federal enclaves. It likewise agrees that, even assuming, as respondents urge, that Congress consented to the taxation of the lessee's interest in such projects, the attempt at taxation made in this

case is void in that it exceeded the Congressional waiver by imposing taxes measured by the full value of Government-owned property. It is not the purpose of this memorandum to repeat in detail petitioner's able and comprehensive discussion and analysis of these issues, but merely to outline the reasons dictating the Government's position.

1. The avowed purpose of the Wherry Act to provide clean, adequate and *inexpensive* housing to encourage skilled military personnel to remain in the armed forces[1] makes it unlikely that Con-

[1] The legislative history makes it indisputably clear that the prime purpose of the Wherry Act was to help servicemen obtain low-rent housing within their means. See H. Rept. No. 854, 81st Cong., 1st Sess., pp. 2, 5 ("the achievement of lower rentals for the personnel of the establishment"); S. Rept. No. 410, 81st Cong., 1st Sess., pp. 4-5 ("housing at rents within the means of as many enlisted personnel and junior officers as possible").

The Act was passed because the armed services need large numbers of technicians and skilled personnel who have had many years of technical training. These persons cannot be replaced on short notice and the Government seeks to offer every inducement that will insure the retention of their services. One of these inducements is to make good housing available on or adjacent to military installations. To serve the purpose of attracting and retaining the services of these persons, the housing must not only be good, it must also be modest in cost.

The Act attempted to keep the cost and rentals of the housing projects at a minimum. This was done by making available government guaranteed loans, by the elimination of land and acquisition costs through the use of government lands, by restricting the investment in the individual unit, and by close supervision and control of operating costs, profits and rents.

See the Appendix, *infra*, p. 9, for a statistical summary of the Air Force's Wherry Act projects (supplied by the Air Force).

The basic purpose of the Act of August 8, 1949, c. 403, 63 Stat. 570, commonly called the "Wherry Act," was to provide clean, comfortable and adequate housing for military personnel and their families at rentals within their limited means. The Armed Services need large numbers of technicians and skilled personnel who have had many years of technical training. These persons cannot be replaced on short notice and the Government seeks to offer every inducement that will insure the retention of their services. One of these inducements is to make good housing available on or adjacent to military installations. To serve the purpose of attracting and retaining the services of these persons, the housing must not only be good, it must also be modest in cost.

The Wherry Act attempted to keep the cost and rentals of the housing projects at a minimum. This was done by making available government guaranteed loans, by the elimination of land and acquisition costs through the use of government lands, by restricting the investment in the individual unit, and by close supervision and control of operating costs, profits and rents.

The issue in this case involves the authority of local taxing units to impose *ad valorem* taxes where the housing project is located on a military reservation over which the United States exercises exclusive legislative jurisdiction. The court below has held that the Wherry Act, by incorporating by reference a part of the Act of August 5,

1947, c. 493, 61 Stat. 774, commonly referred to as the "Military Leasing Act", constituted Congressional consent to the exercise of jurisdiction by the local taxing authorities.

If, as we believe, the court below was wrong in concluding that Congress had receded jurisdiction so as to permit the taxing of property located within a federal enclave, it is clear that the sovereign jurisdiction of the United States has been invaded. And, to the extent that such taxes have been imposed on property belonging to the United States, it is clear that the sovereign immunity of the United States has been violated. Further, to the extent that these housing projects are burdened by local taxes, the burden of the tax will be reflected in increased rentals paid by the military personnel, thus tending to defeat one of the purposes of the Wherry Act.

The dispute in this case is not an isolated one. As petitioner has pointed out, military housing has been erected and is being operated in many jurisdictions under circumstances substantially the same as those here involved. With increasing frequency, local authorities are assessing *ad valorem* taxes on like properties located within other areas over which the United States asserts the right to exercise exclusive legislation. And, in many cases, local authorities are assessing military housing properties in the same manner and to the same extent as though the projects were

gress would have departed from its established practice of consenting to local taxation on federal enclaves only in the clearest and most explicit terms. On the contrary, if Congress had intended to authorize local taxation within a federal enclave, taxation which might reasonably have been expected to hamper one of the principal objectives of the legislation by forcing rental increases to cover increased costs, it would have done so in the plainest language possible and would not have permitted such an important matter of jurisdiction to rest on elaborate implication.

Neither of the provisions of the Wherry Act relied upon by respondents as showing Congressional consent can be described as a clear waiver of federal immunity to state taxation. Section 805 of the Act (12 U.S.C. 1748d), on which the court below relied, does not in terms mention state taxation. Respondents' argument and the decision below justify their conclusion by drawing upon the reference in Section 805 to the Act of August 5, 1947, c. 493, 61 Stat. 774, commonly called the Military Leasing Act. Section 6 of the Leasing Act (5 U.S.C. 626s-6) contains among its provisions the following: "The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation." However, as petitioner's brief points out in detail (pp. 23-35), there are no compelling reasons to make either of the suppositions vital to respondents' position—that the Wherry Act reference to the Leasing Act was intended to incorporate this

owned, not by the United States, but by the lessees.

It is also a matter of obvious importance to the many states in which these projects are located that this Court should settle the question whether Congress has granted them the jurisdiction to impose such *ad valorem* taxes. Until there has been a definitive decision, which only this Court can render, the local taxing authorities will be confronted with serious difficulties in deciding whether to collect these taxes and in determining what to do with the tax proceeds pending a final resolution of the basic issue.

We think that the lower court erred in concluding that Congress intended to recede to the states and local authorities jurisdiction to tax real property within a federal area. Such a retrocession, being in derogation of the sovereign's powers, should be found only where Congress has spoken in the clearest language; it should not rest on implication. The Wherry Act, in referring to the Leasing Act, did not clearly indicate that consent was being granted to tax any interest in real property where the property is located in a federal enclave, if, indeed, consent to taxation anywhere was being granted. Moreover, the legislative history of the Wherry and Leasing Acts would indicate that Congress undoubtedly did not intend that housing projects being erected on military installations should be subject to local taxes.

sentence of Section 6 of the Leasing Act, or that the sentence when originally inserted in the Leasing Act was intended by Congress as a consent to tax a lessee's interest in property located upon a federal enclave.

Section 805 of the Wherry Act authorizes each Secretary of the Armed Forces to make leases "under the authority of said [Leasing] Act upon such terms and conditions as in his opinion will best serve the national interest without regard to the limitations imposed by said Act in respect to the term or duration of the lease * * *". Both the authority to lease and the limitations imposed with respect to the duration of the leases appear in Section 1 of the Leasing Act (5 U.S.C. 626s). Accordingly, there is no reason to attribute to Congress an intent to incorporate more of the Leasing Act than the provisions of that section. Nothing in the language of Section 805 requires that the balance of the Act be incorporated, and Sections 2 through 5 are clearly and indisputably inapplicable in the context of the Wherry Act. There is certainly no ground for believing that there was a special purpose to single out Section 6 of the Leasing Act for incorporation.

Moreover, there is ample room to doubt whether even in the Leasing Act the controversial sentence of Section 6 was intended to apply to interests in property located upon federal enclaves. The provision does not so declare in terms. No statement in the legislative history of the Leasing Act reveals such an aim. The purpose of the Act—to utilize

for private enterprise Government-owned manufacturing facilities temporarily surplus to the needs of armed forces, and normally located outside federal enclaves—does not require that construction. Under these circumstances there is no warrant for assuming that Congress was receding to the states jurisdiction formerly exclusive to the United States.

Section 807 of the Wherry Act (12 U.S.C. 1748f) is the only section of that Act which mentions taxation directly. But, as the court below conceded (R. 199), it cannot be interpreted as authorizing the taxes imposed by respondents in this case. The section provides: "Nothing in this title shall be construed to exempt any real property acquired and held by the [Federal Housing] Commissioner under this title from taxation by any State or political subdivision thereof, to the same extent, according to its value, as other real property is taxed." The section has no application to this case, not only because the Offutt project was not held or acquired by the Commissioner, but also because the provision is only negative in operation. It prevents property from becoming non-taxable under certain circumstances, but does not waive existing immunities, such as that enjoyed by property located upon federal enclaves.

2. Even if Congress intended by its reference to the Leasing Act in the Wherry Act to subject to local taxation the *lessee's interest* in property located upon federal enclaves, the taxes imposed by respondents are invalid in that they exceed the

Finally, even if it is concluded that Congress did intend to grant to the states jurisdiction to tax, the court below plainly disregarded the limitations of the statutes which it thought granted the retrocession. That is, if Congress did recede tax jurisdiction, it clearly limited its consent to the taxing of the interest of the lessee and did not consent to the taxation of the property owned by the United States as lessor. The court below, however, did not limit its decision in this manner. It upheld the assessment even though there was no effort to segregate Offutt Housing Company's interest and tax only that interest; the full value of the property, including the whole ownership interest, as well as whatever value proper appraisal might attribute to the leasehold, was included in Offutt Housing Company's assessment. *United States* v. *Allegheny County*, 322 U. S. 174, 187, shows that such a conclusion is wrong.

Respectfully submitted.

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scope of the Congressional waiver. No attempt to segregate the lessee's actual interest was made in assessing the taxes. Rather, the whole value of the property, title to which was in the United States, served as the measure and basis for the tax. In no event can Section 6 of the Leasing Act be construed as consenting to local taxation of *property owned by the United States*, which, wherever located, is immune from any form of State or local taxation in the absence of Congressional consent. *United States* v. *Allegheny County*, 322 U.S. 174. Similarly, an assumed permission to tax the interest in property created in the lessee by the Wherry Act would not support respondents' attempt to tax the household appliances located on the Offutt project, which were wholly-owned by petitioner independently of any provision of the Wherry Act. *Surplas Trading Co.* v. *Cook*, 281 U.S. 647.

Respondents' argument that the United States acquired only sham title to the buildings for purposes of avoiding local property taxes is plainly without merit. The lease between petitioner and the Government expressly provides that the buildings and improvements erected (R. 138) "shall be and become, as completed, real estate and part of the leased land, and public buildings of the United States * * *". Even if this provision was inserted in the lease solely to advance the purpose of the Wherry Act by avoiding local property taxes, it would not affect the validity of the lease. *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 122. The United States is free to conduct its affairs in the

manner best suited to its purposes, and the intent to acquire and hold ownership of the buildings is unmistakable. Moreover, the Government's ownership of the property was in no sense merely technical, but rather was consonant with the important interests retained by it in the project. The United States prescribed the maximum rentals (R. 93, 136), determined what persons could occupy the apartments (R. 34), assumed most of the financial risk by insuring the mortgagee (R. 133), and performed most of the necessary governmental services by providing police and fire protection (R. 137-138), sewerage and water service (R. 103-104, 110-111), and access roads (R. 110). If anything, the interest of the United States is greater, not less, than that of the typical lessor. The construction put upon the lease by the court below is, of course, not binding upon this Court, which has the final authority in determining the meaning and effect of contracts to which the United States is a party. *S.R.A., Inc.* v. *Minnesota*, 327 U.S. 558, 564; *Kern-Limerick, Inc.* v. *Scurlock, supra.*

CONCLUSION

For the reasons set forth above, as elaborated upon in petitioner's brief, the judgment of the court below should be reversed.

Respectfully submitted.

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MARCH 1956.

APPENDIX

Statistical Summary of Air Force Wherry Act Projects

There are 106 housing projects at 57 Air Force installations located in 26 States and one possession (Puerto Rico); these projects include a total of 37,623 family housing units. Of the total of 106 projects, 14 projects at 9 Air Force installations (involving 5,243 units) are located off-base on privately-owned land. The remaining 92 projects are located on-base and completely on Government-owned land, at 51 Air Force installations, and include 32,380 family units.

At present, there are 62 on-base projects at 34 locations (involving 22,341 units) being taxed, and the amount of tax ranges from $28.00 per unit per month, or $336 per unit per annum, down to $.50 per unit per month; the average amount of tax is approximately $12.00 per unit per month.

There are now 30 on-base projects (involving 10,039 units) not being taxed and the tenants do not have an allowance for taxes in their monthly rentals.

Of the 92 on-base projects, 32 projects at 16 locations in 12 States (involving 11,588 units) are now affected by litigation; at three locations the litigation was settled by agreement.

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BRIEF OF *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE*

Grant County, Washington, appears herein as *amicus curiae* pursuant to Revised Rule 42 of this Court.

Moses Lake Homes, Inc. (R. 75), a Washington corporation, was organized to construct and operate 400 rental housing units on federal lands at Moses Lake (now Larson) Air Base in Grant County, Washington. The lease-mortgage-FHA arrangements are almost identical to those appearing here. In 1952, Grant County assessed the improvements to the Moses Lake Company for 1953 taxes. Section 11 of the Moses Lake lease provided:

"11. Upon the expiration of this lease, or earlier

> termination, all improvements made upon the leased premises shall *become* the property of the Government without compensation. * * *." (Pl.'s Exh. 3, Wash. Sup. Ct. No. 32442)

Immediately following the assessment, the parties, without consent of the mortgagee or the F.H.A., presumed to modify this section retroactively to provide the improvements were "to remain" the property of the Government. Section 11 of the lease in this case provides (R. 138):

> "11. Upon the expiration of this lease, or earlier termination, all improvements made upon the leased premises shall *remain* the property of the Government without compensation. * * *."

Three days after the execution of the "Modification," the Moses Lake corporation brought suit against Grant County to enjoin collection of property taxes. The injunction was denied after trial on the merits. The Moses Lake corporation appealed the decision to the Washington Supreme Court, No. 32442, but withdrew its appeal prior to argument and the judgment was affirmed on *remittitur*. There, as here, the United States took no part in the action.

Grant County then assessed taxes for subsequent years and Moses Lake again sought to enjoin alleging that the trial court had found "title" was in the Government thus the denial of the injunction was not *res judicata*. The case is now on appeal before the Washington Supreme Court both on the merits and on the defense of *res judicata*. The decision herein on the fedral issues will control the determination of the Washington Court.

The Moses Lake situation differs from this in that Grant County admittedly provides from its tax funds:

> "Police and sheriff protection, fire protection, and the usual grade school and educational facilities." (No. 32442, Find. XVI, Tr. 114, Not Assigned as Error)

to the project and its residents. Appellant alleges otherwise here.

The further and perhaps primary difference is that the Moses Lake houses are upon lands over which the state has concurrent jurisdiction. Here appellant strenuously urges that Offutt homes are within the "exclusive" jurisdiction of the United States.

The position of *amicus curiae* is that "exclusive" jurisdiction in the sense a federal enclave is considered outside state territorial boundaries no longer exists. In too many fields states have reserved or Congress has granted the states certain taxing, police, and other powers, with concurrent tax supported duties. "Exclusiveness," if it exists at all, must therefore be examined with relation to specifics.

If, however, appellant prevails on the issue of exclusive federal jurisdiction, we submit the opinion herein should so specify, leaving the many projects located upon concurrent jurisdiction areas to another day.

STATEMENT OF THE CASE

Much, if not most, of the testimony in this case was an attempt to construe the various documents, statutes and applicable Constitutional concepts. Except for testimony on the length of life of the buildings, the documents speak for themselves. The balance has never been a proper subject for testimony.

Appellant, a Nebraska corporation, was formed December 23, 1950 (R. 156). Ten of its 80,000 shares were termed preferred and issued to the Federal Housing Commissioner (R. 94, 148). A good portion of the land involved was purchased and donated by the Omaha Chamber of Commerce for the project (R. 11, 32, 37).[1]

1. The Lease (R. 132-143)

The lease was executed on January 18, 1951,[2] and the mortgage February 1, 1951 (R. 179). Since each document not only contemplated but was conditioned upon the other, the two must be treated as an integrated transaction. Apparently both documents were upon general F.H.A. forms (R. 68, 70).

In exchange for $100 per year, appellant

> "Under authority of the Act of August 5, 1947 (10 U.S.C. 1270) and the Act of August 8, 1949 (P.L. 211, 81st Cong.) [12 U.S.C. Sec. 1748 (a) to (e)]" (R. 132)

leases bare land from the Air Force for a period of 75 years (R. 132):

> "For the purpose of erecting, maintaining and operating a housing project, consisting of approximately 611 units, substantially in accordance with outlined plans and specifications submitted to the Department of the Air Force and in accordance with the detailed plans and specifications to be ap-

[1] The appellant in the trial court attempted to disassociate itself with the gift (R. 48). Its counsel, Mr. Reed, is apparently the same Charles E. Reed who was President of the Chamber of Commerce and who executed the deed (R. 190).

[2] The lease was executed in Omaha by appellant (R. 100, 143). Air Force Notaries Public apparently do not take their duties seriously as unaccountably the same document was allegedly notarized in Arlington, Virginia, on the same day (R. 143).

proved by the Federal Housing Commission." (R. 132)

The appellant borrowed the money to build the project from a bank. The loan was secured by a mortgage on its leasehold interest in the land and upon the improvements to which it warranted it had title (R. 171). The mortgage was insured by the F.H.A.

The Air Force, with consent of the Federal Housing Commissioner, could terminate the lease for non-payment of the $100 rental but the security holders could pay the rental and the F.H.A. could reinstate the lease within nine months of any notice to it of default (R. 140). Possession was in appellant but the Air Force reserved the right to "re-enter" (R. 133) and inspect (R. 139). The area was subject to reasonable A. Force Security and Safety regulations (R. 138).

Appellant agreed to lease its housing units on a priority basis to military and civilian personnel working on the base. This included contractor's employees. Absent these, the units were open to anyone (R. 134-5). All tenancies were for a year and then on a month to month basis. Leases to other than military or civilian personnel connected with the base could be terminated by appellant in the event Congress or the President declared a National Emergency (R. 136).

Under Lease section 4 (R. 136), when the mortgage was paid (and the F.H.A. no longer determined the rental rates) the rents would be set by mutual agreement of the Commanding Officer and appellant, but they could be no less than the "rents then in effect" (R. 136). Appellant must use due diligence to protect the

premises from damage and must comply with all local "laws, ordinances and regulations" with

> "regard to construction, sanitation, licenses or permits to do business, and other matters." (R. 136)

Lease, Section 8 (R. 137) provides:

> "That the Lessee shall pay to the proper authority, when and as the same shall become due and payable, all taxes, assessments, and similar charges, which, at any time during the term of this lease may be taxed, assessed or imposed upon the Government or upon the Lessee with respect to or upon the leased premises." (R. 137)

The above pertains to taxes upon improvements. Section 8 provides as to the land (R. 137):

> "In the event any taxes, assessments or similar charges are imposed with the consent of the Congress of the United States upon the property owned by the government and included in this lease (as opposed to the leasehold interest of the Lessee therein), this lease shall be renegotiated so as to accomplish an equitable *reduction* in the rental provided above * * *."

Thus if taxes were imposed upon the bare land, the $100 annual rental would be reduced (R. 137).

If the improvements were "government property," section 8 would speak of increasing rental rates to appellant's tenants. Little can be more specific that taxes on the improvements were to be paid by the lessee. Taxes upon government property—the bare land—would also be paid by appellant who would then pay the Air Force reduced ground rent. If taxes on the 5 million dollars of improvements were contemplated, the $100 per year would hardly suffice. Yet this is the *only* "government property" spoken of.

Pursuant to 5 U.S.C.A. §§626s to s-2 (Cum. Supp.), the Air Force agreed to sell to "*the Lessee's housing project*" (Lease R. 137) certain utility services. If the lessee damaged or destroyed "government property," it must be replaced or paid for (Lease, Sec. 16, R. 139). In contrast, if any portion of the housing project were destroyed, the insurance was payable *only* to the lessee and security holder (Lease, Sec. 20, R. 141-142). The appellant could pocket the entire proceeds if the security holder and its insurer agreed (Mtge. sec. 6, R. 176)—the Air Force was entitled to nothing. If the project were condemned by the government, the mortgagee could insist that the condemnation award went to reduce the mortgage debt (Mtge. sec. 7, R. 176). Again the Air Force was entitled to nothing. In the event of default the security holder had the right to take over the lease (R. 140).

2. The Mortgage (R. 169-182)

The appellant on February 1, 1951, mortgaged the following to the Manufacturers Trust Company of New York:

[1] "All right, title, interest and privileges of the mortgagor in and to that certain ground lease between the Secretary of the Air Force representing the United States of America, and Mortgagor, dated January 18, 1951 * * *." (R. 170)

* * * * * * * *

[2] "Together with the privileges and appurtenances to the same belonging, and all of the rents, issues, and profits which may arise or be had therefrom; and (R. 170)

[3] "Together with all buildings and improvements of

every kind and description now or hereafter erected, or placed thereon, and all fixtures, including but not limited to all gas and electric fixtures, engines and machinery, radiators, heaters, furnaces, heating equiipment, steam and hot-water boilers, stoves, ranges, elevators and motors, bathtubs, sinks, water closets, basins, pipes, faucets and other plumbing and heating fixtures, mantles, refrigerating plant and refrigerators, whether mechanical or otherwise, cooking apparatus and appurtenances, furniture, shades, awnings, screens, blinds and other furnishings; and (R. 170-171)

[4] "Together with all building materials and equipment now or hereafter delivered to said premises and intended to be installed therein." (R. 171)

Further:

"The Mortgagor, represents to and covenants with, the Mortgagee, that the Mortgagor has a good right to sell and convey said premises; that they are free from encumbrance * * *. The intention being to convey hereby *an absolute title in fee simple,* including all rights of homestead and other rights and interests as aforesaid." (Emphasis supplied) (R. 171)

Thus appellant mortgaged (1) its leasehold interest, (2) its personal property, and (3) its buildings and improvements. Few words of ownership and title can be more clear than a fee warranty.

By this mortgage plus F.H.A. approval, appellant borrowed $4,949,100 at 4% interest (R. 172). Payments were $22,683.37 per month or $272,800.44 per year (R. 172). The appellant also covenanted to pay

(1) The F.H.A. insurance premium (R. 174); and

(2) All taxes and assessments (R. 175).

The insurance policies taken out by the appellant on the project are not in this record. However, we presume they are the same as those in *Moses Lake* case which insured the buildings and improvements to the private corporation and the security holder *only*.

The mortgagee is a private corporation. The F.H.A. insures the loan for a consideration and its function is limited to the protection of the security for the period of the mortgage only.

3. Limited Assignment of Rents (R. 182-8)

In July, 1953, the appellant required $28,771.56 to pay a mortgage installment. It borrowed this sum from the County Bank of Omaha and for security assigned the rents (its accounts receivable). The assignment represented:

> "Offutt Housing Company *is the owner* of 611 housing units located at Offutt Field, Sarpy County, Nebraska * * *." (R. 182) (Emphasis supplied)

And further:

> "Offutt Housing Company hereby assigns to Douglas County Bank of Omaha all rentals from *its* housing project at Offutt Field, Sarpy County, Nebraska * * *." (Emphasis supplied) (R. 183)

The life expectancy of the buildings is less than the term of the lease. There is no cost to the government whatsoever for the project. Here as in the Moses Lake case neither the Air Force nor any federal agency shares the profits, the management or the operation of the project subject to security and safety requirements. Cost of the water purchased from the Air Force is esti-

mated at $2,350 annually (R. 163) and this amount is included in the rental (R. 164). The appellant maintains roads on its leased property and the Air Force the roads on the non-leased area (R. 110). The manager and maintenance employees are employees of the appellant (R. 163).

The average rental is $71.04 (R. 130) monthly. *If* no local taxes had been included in the project analysis, the increased rental would be $1.47 per month—perhaps $2.00 per month for future years.[3] However, local taxes of $13,904 annually were included in the project analysis (R. 164). The amount is more than coincidentally close to the actual taxes involved—$10,783.45 in 1952 on the partially completed project and $15,865.69 (R. 47) on the completed homes. Thus to uphold the tax would result in 26c per unit per month rental increase.[4] Offutt rentals apparently approximate private rentals nearby (R. 46).

Of the 611 units, 300 were reserved for officers (R. 59) who also have the larger homes (R. 167). The Commanding Officer stated that the officers took the "non-deplorable" (App. Br. p. 3) "low rental" houses in order to "subsidize" enlisted personnel (R. 59, 64-65). Appellant states that maximum rentals are fixed by the F.H.A. with the "concurrence" of the Air Force who considers the ability of the base personnel to pay (R. 66). This is questionable. Rental is and must be

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[3] $10,783.45 ÷ 611 = $17.65 per year; $17.65 ÷ 12 = $1.47 per month (see R. 5, 144A, 164).

[4] $15,865.69 taxes on completed project less $13,904 taxes estimated and included in rent = $1,961.69 total per year. This divided by 611 units = $3.21 per year or 26c per unit per month (See R. 144C, 164).

based upon the amortized gross cost of the project, the cost of each unit being fixed by law (R. 158). Quarters allowances are specifically fixed by Congress, 37 U.S. C.A. §252.[5]

Local taxes are for both general and specific purposes. For example, if property is not located within a school district, the taxes levied against that property will not include amounts for a school district. This would be the only explanation for the statement in the project analysis that State and local school taxes were assumed to be not applicable because other "special local taxes"—for the "cost of street and utility maintenance" *were* deemed applicable (R. 164) and included.

SUMMARY OF ARGUMENT

I. "*Exclusiveness*" *of Jurisdiction*: The Nebraska court has held that its laws did not cede exclusive tax jurisdiction of this land to the United States (R. 205). This is a state question and on its own law, Nebraska's decision is final. Unless an overriding Federal statute exists asserting exclusive federal jurisdiction for state tax purposes (or more properly, denying to Nebraska that which it did not cede), Nebraska has tax jurisdiction over the project.

II. "*Ownership*": Under general as well as Nebraska law (R. 208-209), improvements under this type of a lease are taxable to the lessee. This is true even if the lessor is an exempt state body. It is also true when the lessor is the United States unless Congress has specifi-

[5] Enlisted men receive from $51.30 to $96.90 and officers $68.40 to $171.00.

cally prohibited taxation of the lessee. The reason for the rule taxing such improvements at their full value is that the bundle of rights in the lessee constitutes beneficial ownership. The bare title and reversionary interest in the lessor does not alter that substantive beneficial and taxable ownership where (1) the improvements will not last the term, (2) all insurance in the event of loss is the sole property of the lessee and its secured creditors, (3) the documents warrant fee title of the improvements in the lessee, and (4) where no question exists as to the personalty.

This, too, is a pure question of state law. It controls unless a contrary federal common law exists or a Congressionally stated federal policy is controverted. The omnibus as well as specific federal policy supports state taxation.

The situation is very similar to that of *Helvering v. Clifford*, 309 U.S. 331, 84 L.Ed. 788 (1940) and subsequent cases holding one may not escape federal income taxes by formalizing a transfer in trust while retaining true beneficial ownership.

III. *Consent of Congress*: Every appellate court to which this issue has been presented has held that Congress has granted the requisite consent. Federal statute declares that the lessee's interest or property

"shall be made"

subject to state taxation, 5 U.S.C.A., §626s. The Military Housing Act declares that if the project is acquired by the Federal Housing Commission it shall remain subject to state taxation, 12 U.S.C.A. §1248f (1949).

ARGUMENT

I. "Exclusive" Jurisdiction

Appellant bases its argument on the erroneous premise that the United States has some sort of "exclusive over-all" jurisdiction over the Offutt land area. True exclusive jurisdiction quite obviously does not exist.[6] In general, Congress may assert exclusive legislative jurisdiction

> "over all places purchased by the consent of the legislature of the state"[7]

for forts, magazines, arsenals, dock yards and other needful buildings, Art. I, §8, Cl. 17. A state may reserve such

> "Concurrent jurisdiction as is not inconsistent with the jurisdiction ceded to the United States." *James v. Dravo,* 302 U.S. 134, 82 L.Ed. 155 (1937)

It was early decided that the state may reserve to itself the right to tax private property within the federal area, *James v. Dravo, supra; Ft. Leavenworth R. Co. v. Lowe,* 114 U.S. 525, 29 L.Ed. 264 (1884); and see 14 Wash. Law Rev. 1, 6 (1939).

Appellant states Nebraska law did not reserve the right to tax its property. Since we are bound by Nebraska's interpretation of its own law, appellant's claim to a private tax immunity must find some other source.

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[6] The state has "jurisdiction" over this area to impose and collect business, sales, income, etc., taxes, 4 U.S.C. §§104-110; Congress provides a federal violation of a state law under 14 U.S.C. §13, the state has jurisdiction of civil actions for wrongful death, 16 U.S.C. §457; and under state workmen's compensation acts, 40 U.S.C. §290.

[7] The word "purchased" means an actual purchase for consideration, *Chi. R. I. & Pac. R. Co. v. McGlinn,* 114 U.S. 542, 29 L.Ed. 270 (1884).

If under Nebraska law, it *has* reserved tax jurisdiction, and this is not only consistent with but directly follows specific Congressional direction, the doctrine of exclusive jurisdiction as announced in *Surplus Trading Co. v. Cook*, 281 U.S. 647, 74 L.Ed. 1091 (1929) is simply not applicable.

II. The Improvements Would Be Taxable to Appellant Under Common Law

A. Personal Property

The tax assessed against appellant was for (R. 144a):

(1) "Improvements on leased lands"	$755,785,
(2) Household appliances	69,695,
(3) Appellant's office equipment	205
	$825,685

The personal property is unquestionably and completely owned by appellant subject to security interests (R. 190A-194). It is taxable unless Nebraska ceded its taxing jurisdiction which its Supreme Court denies. Further, Congressional action has specifically made such items taxable. Appellant however, urges that (contrary to his position on the lessee's interest) that this property is not taxable because federal act only authorizes state taxation of the "lessee's interest" and as to this property it is not a lessee (Ap. Br. 57).

B. Improvements Upon Federal Realty

There has been no attempt to tax the realty or to include its value in the measure of the tax (R. 144a). The issue is limited solely to the value of the improvements.

1. What is taxed—Valuation

This is perhaps the most misunderstood in the field of taxation. Without consent, a State may not tax property "owned" by the federal government. Since "title" usually is consonant with ownership, it is easy to conclude that the State may not tax property when "title" is in the United States.

A more correct statement would be that the State may not include tax exempt interests in its valuation of property for tax purposes. Under general and Nebraska common law (R. 209), bare legal title, a possibility of reverter or other reversionary interest, or the lessor's interest in a lease of 99 or 75 years, is not such an interest to prevent taxation of the full value of the improvements to the lessee. This is particularly true where the improvements will not last the length of the term and when all rents from sub-lessees and profits accrue to the lessee.

Snce this type of lessee under Nebraska law is taxed to the full value of the improvements, appellant raises no federal question unless he shows that when the lessor is a tax exempt federal entity, that the value of the lessor's interest has been included. The lessee would then be entitled to a tax reduction to the value of that exempt interest but no more. He must establish the value of that interest which has not been done.

The supporting case law is set forth *infra*.

2. "Title"

"Title" is not the keystone. It is but one incident in total ownership. Often, as in trusts, title is completely distinct from "beneficial" ownership. In tax matters,

the clearest example is found where the United States sells property retaining title for security purposes. There the United States has: (1) title; (2) a reversionary interest; and (3) an "equity" in the taxed property to the extent of the unpaid sales price. Neither of these interests alone, nor their combination, prevents local taxation of the sold item at its full value to the private purchaser, *S. R. A. v. Minnesota*, 327 U.S. 558, 90 L.Ed. 851 (1946). This is true even though the seller has yet received no payments.

In a conditional sales contract, the seller has created or originally owns the complete value of the *res* sold. In a long-term lease situation as here, the lessee creates the value by constructing at its own expense and for its own profit improvements which will not last the length of the term. The lessor's reversionary interest in the improvements is but slightly more than zero. The "value" thereof even less.

The situation is strikingly similar to the doctrine first announced in the income tax case of *Helvering v. Clifford*, 309 U.S. 331, 84 L.Ed. 788 (1940). There to avoid federal income taxes a taxpayer transferred certain interests in trust to others retaining a formal trustee's interest plus the rights of control and profit. This Court properly held the rights retained was a beneficial and thus taxable ownership of the income from the entrusted items. The "bundle of rights" he retained was too substantial for him to complain of being taxed as sole owner.[8]

The rule of thumb is that if the legal incidence of the

[8] See also *Du Pont v. Commissioner of Internal Revenue*, 289 U.S. 685, 689, 77 L.Ed. 1447, 1449 (1932).

state tax is upon a private person, it is of no import that the economic incidence is upon the sovereign either state or federal.[9]

This is true even if a valid federal activity is involved, *Silas Mason Co. v. Tax Commission*, 302 U.S. 186, 82 L.Ed. 187 (1937) unless Congress has specifically declared such contractors or lessees exempt, *Carson v. Roane Anderson*, 342 U.S. 232, 96 L.Ed. 257 (1952), and *Esso Standard Oil v. Evans*, 345 U.S. 495, 97 L.Ed. 1174 (1954).

Where ad valorem taxes are involved, the question is whether the legal incidence of the tax is upon the *res* owned by the United States. Bare title alone is not the *res*.

Perhaps the most important decisions in this area are the conditional sales cases. In *S. R. A. v. Minnesota, supra*, the United States sold property on a conditional sale to a private citizen specifically reserving legal title until paid in full. Minnesota levied its property tax. The question was the

> "Power of Minnesota to tax realty within the boundaries of that state, when the legal title remains in the United States." 90 L.Ed., p. 854.

The answer was

> "The whole equitable ownership is in the petitioner and the value of that ownership may be ascertained on the basis of the full value of the land." *New Brunswick v. United States, supra*, 276 U.S. 547, 72 L.Ed. 693 (1928), 90 L.Ed. at p. 860.

Where mining claims are involved, federal title is also

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[9] *Alabama v. King & Boozer*, 314 U.S. 1, 86 L.Ed. 3 (1941); *Du Pont de Nemours v. State*, 44 Wn.(2d) 339, 267 P.(2d) 667 (1954).

no bar to state property taxation. *Elder v. Wood*, 208 U.S. 226, 52 L.Ed. 464 (1908).

On an issue involving consumer sales taxes upon materials for a military housing project under what appears an identical lease, the Florida Supreme Court held that beneficial ownership, not "paper title" controls, *Gay v. Jemison*, 52 So.(2d) 117 at 137 (Fla. 1951), see also *Moses Lake Homes, Inc., v. State Tax Comm.*, 148 Wash. Dec. 462 (Adv. No. 16, Mar. 15, 1956).

In *Railroad Co. v. Penniston*, 85 U.S. 5 (Wall. 1873), the United States had chartered the Union Pacific Railroad. The corporation was assisted by direct federal loans and it contracted to construct lines, carry troops, mails, etc. The Nebraska ad valorem tax was held to be valid. See also *Thomson v. Pacific Railway*, 76 U.S. 111, 19 L.Ed. 792 (1870); *Wisconsin R. Co. v. Price County*, 133 U.S. 496, 33 L.Ed. 687 (1890), and *Nor. Pac. R. Co. v. Patterson County Treas.*, 154 U.S. 130, 38 L.Ed. 934 (1894).

See also the numerous citations in *Haumesser v. Chehalis County*, 76 Wash. 570 at 574, 136 Pac. 1141 (1913), where although the facts were different the court quoted with approval:

> "It is the well-established doctrine that he who has the right to property and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of taxes. *Railroad Co. v. Price, supra*, 133 U.S. 496." See 33 L.Ed. at p. 692.

For cases more directly in point,[10] see *P. W. & B. R.*

[10] *Russell v. New Haven*, 51 Conn. 259 (1883); *Burbank v. Board of Assessors*, 27 So. 947 (La. 1900); *Norfolk v. J. W. Perry Co.*, 61 S.E. 867 (1908); *Hines Lumber Co. v. Lane County*, 248 P.(2d) 720 (Ore. 1952); *Ex Parte Gaines*, 19 S.W. 602 (Ark. 1892); *Bentley v. Barton*, 41 Ohio St. 410 (1884).

Co. v. Appeal Tax Court, 50 Md. 397 (1879). A railroad company leased land from a tax exempt city for a 99-year term. The court held (1) the lessee should be taxed on the land to the extent of its leasehold interest, and (2) directly upon the improvements erected by the lessee at their full value. The court stated:

> "As to the improvements placed upon the two parcels leased from the city by the appellant, we fully concur with the court below, that they were placed upon the demised premises by the appellant for its own use and benefit, they were properly assessed to the appellant at their full assessable value."

In *Broadway and Fourth Ave. Realty Co. v. Louisville*, 197 S.W.(2d) 238 (Ky.), a realty company leased land from a tax exempt educational institution for 99 years. The court held the lessee should be taxed on the improvements erected by it as if it had title and full ownership.

Outer Harbor, Dock & Wharf Co. v. Los Angeles County, 193 Pac. 142 (Cal. App. 1920). The lessee constructed a wharf and warehouse on leased state lands and was properly taxed on the improvements as owner. See also *San Francisco v. McGinn*, 7 Pac. 187 (Cal. 1885), where the lease was but for 50 years. Compare *San Diego County v. Davis*, 33 P.(2d) 827 (Cal. 1934).

3. Appellate decisions on th e housing projects

Every appellate court decision rendered as of this writing has held the state property tax applied to these identical housing projects whether the enclave on which the property was constructed was under exclusive jurisdiction or not.

Where title was clearly in the lessee, this has been used as an additional ground. See *Fort Dix Apartment Corp. v. Borough*, and *Sheridanville, Inc., v. Borough*, 125 F.Supp. 743 (1954), taxability affirmed on appeal, 225 F.(2d) 473 (1955) pet. for cert. pending No. 484; *Meade Heights, Inc., v. Tax Commission*, 95 A. (2d) 280 (Md. 1953); *Gay v. Jemison*, 52 So.(2d) 117 (Fla. 1951); *Dayton Devel: Ft. Hamilton Corp. v. Boyland*, 133 N.Y.S. 821 (1954); *Conley Housing Corp. v. Coleman*, Sup. Ct. of Georgia, No. 19001 (Sept. 12, 1955); and this case, *Offutt Housing Co. v. County of Sarpy*, 70 N.W.(2d) 382 (Neb. 1955).

The above decisions also held that Congress had specially consented to this taxation.

III. Congress Has Provided Such Housing Projects Taxable to Appellants

A. General Congressional Approach

Our position is that these projects were (1) taxable under general law and (2) Congress did all it could to insure they remained taxable.

For some years, Congress has been concerned not only about military housing but all housing. Its policy in passing the Housing Act of 1949 (42 U.S.C.A. Sec. 1701, *et seq.*), was

> "The goal of a decent home and a suitable living environment for every American family." S. Rpt. 84, H. Rept. 590, Conf. Rpt. 975, U.S. Code, Cong. Serv. 81st Cong. 1st Sess., 1949, pp. 1551-2, 1559.

Similarly, Congress was concerned in the Alaska housing act with the

> "extremely acute housing shortage"

in Alaska. P.L. 52, Ch. 89, S. Rept. 129, U.S. Code Cong. Serv. Vol. 2, 81st Cong. 1st Sess. 1949, p. 1245. If adequate housing for families of service men were not available, Congress was and should be concerned. However, there is nothing in the Act or in its legislative history to indicate Congress altered its policy that these projects be taxable even where the F.H.A. became owner.

Where a federal instrumentality has been established to act in a particular fiscal field, income and debentures were exempted federal and state taxation, but the property itself has uniformly been made taxable.[11]

If appellant here defaulted and the F.H.A. took over the project and its operation, these taxes would be paid, *Byram Holding Co. v. Bogren, supra,* note 11. May appellant claim Congress intended it enjoy a more preferred position. The claim cannot be based on low rent reasons if taxes would be due if the F.H.A. took over the project. There is no allegation that appellant is a federal instrumentality or that its corporate income, bonds, stocks, etc., are exempt.

Congress properly felt its over-all position should obtain. If federal instrumentalities paid state property

[11] Federal Reserve Banks, 12 U.S.C.A. §§531, 548 (3); Federal Land Banks, National Farm Loan Associations, 12 U.S.C.A. §§931, 932 and 933; *United States v. Stewart,* 311 U.S. 60, 85 L.Ed. 40 (1940); Federal Farm Mortgage Corp., 12 U.S.C.A. §1020f; Production Credit Corporations, and Banks for Cooperatives, 12 U.S.C.A. §1138c (Supp.); National Agric. Credit Corps, 12 U.S.C.A. §§548 and 1261; Fed. Home Loan Banks, 12 U.S.C.A. §1433; Home Owners Loan Corp., 12 U.S.C.A. §1464h (Supp.); UNDER NATIONAL HOUSING ACT, (1) War Housing Insurance, 12 U.S.C.A. §1706b, *Byram Holding Co. v. Bogren,* 63 A.(2d) 822 (N.J. 1949); (2) Mortgage Insurance, 12 U.S.C.A. §§1713i and 1714, *Byram* case, *supra;* (3) National Mortgage Associations, 12 U.S.C.A. §1722; (4) War Housing Insurance, 12 U.S.C.A. §1741; and even Federal Credit Unions, 12 U.S.C.A. §1768.

taxes, private parties should not be exempt. Local citizens whether military or civilian should pay their fair share of local services. A good summary of the pertinent legislative history is found in House Rept. 854. U.S. Code Cong. Serv. 81st Cong. 1st Sess., 1949, pp. 1757, *et seq.*

B. Specific Congressional Intent

This lease was specifically (R. 132) executed under the authority of 10 U.S.C.A. 1270-1270(d) (1947 Act) and 12 U.S.C.A. Sec. 1748 *et seq.* (1949 Act).

(a) 1947 Act

In 1947, the Air Force was authorized to lease federal property to private persons for a period of not more than five years unless a longer period would promote the national defense, 5 U.S.C. Sec. 626 s-3.

Section 6 of that Act (61 Stat. 775, 5 U.S.C. Sec. 626 s-6 (bound volume)) provided specifically that:

> "The lessee's interest, made or created pursuant to the provisions of this Act *shall be made* subject to state or local taxation." (Emphasis supplied.)

Further,

> "Any lease of property authorized under the provisions of this Act shall contain a provision that if and to the extent that such property is made taxable by state and local governments by Acts of Congress, in such event the terms of such lease shall be renegotiated."

The purpose of this section was stated to be

> "Sec. 6 provides that the interest a lessee holds under this Act shall be subject to State or Local taxes," S. Rpt. 626, U.S. Code Cong. Serv. 1947, 81st Cong., 1st Sess., pp. 771, 1593.

The second portion was explained:

> "In the event of States not presently having legislation permitting the taxing of such property enacting such laws subsequent to the negotiation of a lease under this Act, this section provides the lease may be renegotiated." U.S. Code Cong. Serv. 1947, 1st Sess., 81st Cong., p. 1593.

(b) 1949 Act

In 1949, the F.H.A. government insurance program for private housing was working sufficiently well that Congress determined that the same Act and procedures could be utilized for military family housing. The Act of 1949 or "Wherry Act," added Title VIII to the National Housing Act. It removed the five-year limitation and provided for F.H.A. mortgage insurance. In the event of default, the F.H.A. would acquire all interests of the lessee. These projects were considered already taxable, but to prevent any question if the F.H.A. took over a project, 12 U.S.C. Sec. 1748f, (63 Stat. 570, Sec. 807), provided:

> "Nothing in this sub-chapter shall be construed to exempt any real property acquired and held by the [F.H.A.] Commissioner under this Title by any State or political subdivision thereof, to the same extent, according to its value, as other real property is taxed."

Congress described its intention in this provision as:

> "Sec. 807 would provide that the acquisition of real property by the Commissioner would not *exempt* it from taxation." (Emphasis Supplied) House Rpt. 854, U.S. Code, Cong. Serv. 1949, 81st Cong., 1st Sess, p. 1764.

The legislative history of the Wherry Act of 1949

is found in U.S. Code, Cong. Serv., 81st Cong., 1st Sess. 1949, p. 1752 *et seq.* Congress was following established patterns. There was no reason to exempt income as the lessees were private not federal instrumentalities and even less reason to exempt property. Contrary to appellant's (Br. 15) statement as to Government financial participation, the report states that:

> "No cost to the government would be involved unless, through deactivation, or curtailment of military installation or other causes, there are losses in excess of the premium and other payments by the Mortgagee to the insurance fund." Hse. Rpt. 864, *supra*, p. 1760.

If the premiums were properly established, the insurance fund, not the government, would suffer the loss.

No clearer contemplation of lessee ownership can be found than those provisions relating to condemnation of the project. Congress stated:

> "Provision is made under which a mortgagee could receive the proceeds of the insurance in the event all or a substantial part of the mortgaged property is condemned or otherwise acquired by the United States for military purposes. Although it appears unlikely that the armed services would seek to acquire property already serving their needs, there would appear to be no reason why mortgagees should be deprived of the benefits of the insurance in any such types of cases." House Rpt. 854, *supra*, p. 1763.

(c) The 1955 Act

In the Housing Amendments Act of 1955, Title VIII (Military Housing) was replaced by Title IV. Appel-

lant infers (Br. 5-6) that Congress abolished state taxation by this Act while Congress itself states:

> "Title IV of the bill relates to privately financed military housing. It would bring the Wherry Act up to date, and make it a fully workable vehicle for starting *privately financed and privately owned housing* in many areas where housing for the military may be needed. Under this Act, some 88,000 units for military personnel have been or are in the process of being built for military personnel with private funds. It does not seem desirable to abandon this useful Act; rather, it seems preferable to try to make it as workable as possible and use it whenever it can do the job." (Emphasis Supplied) H. Rpt. 913, U.S. Code, Cong. Serv. 1955, p. 2931.

As to "ownership" of existing housing projects, Congress said:

> "S. 2126 also includes a provision which would permit the military to purchase any Wherry Act project, where the owner or owners of such project are willing, at a fair market value of the property as determined by an independent appraisal, or to acquire the property by condemnation in case reasonable efforts to negotiate a purchase are unsuccessful." Hse. Rpt. 913, *supra*, p. 2932.

(d) Appellate cases

Every appellate decision dealing with taxability of these projects has held them taxable to the lessee. It has made no difference that "title" in some instances was in the United States or that the enclave may have been in "exclusive" federal jurisdiction.

1. *Sheridanville, Inc. v. Borough of Wrightstown*;
2. *Fort Dix Apartments Corp. v. Borough*: The dis-

trict court upheld taxability, 125 F. Supp. 743 (1954). This was affirmed on appeal to the Third Circuit, 225 F.(2d) 473 (1955). There each corporation leased federal land from the military, upon which each constructed a similar housing project under similar if not identical terms. The tax imposed was a property tax on the improvements.

> "The Fort Dix Apartment Corp. lease provides that any buildings erected upon the leased premises become upon completion, the property of the United States leased to the corporation. Sheridanville's lease on the other hand, provides that title to any improvements constructed on the leased premises remains in Sheridanville during the life of the lease * * *." 225 F.(2d), p. 474.

A petition to this court for *certiorari* (apparently in the *Fort Dix case*) is now pending, No. 484 or 499.

In both these cases, the land was in the exclusive jurisdiction of the United States. The district court stated relative to beneficial ownership:

> "The fact is that in no case will the burden of this tax fall upon the United States. Indeed, in the light of the terms and conditions of the plaintiffs' leases the title of the Government to these properties is only a paper one and to all intents and purposes they may well be considered the properties of the private corporate plaintiffs here in view of the fact that their complete domination over the properties extends for a period of seventy-five years—obviously a goodly life term for them." 125 F. Supp. at p. 753

3. *Meade Heights, Inc. v. State Tax Com.*, 95 A.(2d) 280 (Md. 1953). There several corporations leased federal land also within the exclusive jurisdiction of the

United States. The lease provided in effect that title to the improvements was to remain in the corporate lessees (R. 211). The Maryland Court held that the lessees had the only substantial interest in the improvements and upheld the tax. It further held that Congress had consented to the taxation, 95 A.(2d) at p. 284. The United States as intervenor contended that its reversionary interest was included in the measure of taxed value but this was denied. Neither the United States nor the taxpayers sought *certiorari*.

4. *City of Annapolis v. Arundeland, Inc.*, 106 A.(2d) 493 (Md. 1954). Although involving a different question, the parties admitted the validity of the *Meade Heights* decision, and the court affirmed it.

5. *Westinghouse Elec. Corp. v. State Tax Comm.*, 111 A.(2d) 661 (Md. 1955) again affirmed the *Meade Heights* decision, pp. 664-5. The court also stated that if the government had title, why were provisions included permitting the government to *acquire* title through mortgage foreclosure, etc. Further, why was not the government the beneficiary of at least some of the insurance proceeds in the event of destruction of the property.

6. *Guy v. Jemison*, 52 So.(2d) 137 (Fla. 1951). This involved retail sales taxes imposed on consumers upon materials used in construction of one of these housing projects on federal lands. The lease appears to be identical. The court held that both by consent of Congress, 52 So.(2d) at p. 137 and under the general doctrine of beneficial ownership the taxes were valid. The Florida statute specifically exempted:

"'Sales made to contractor of tangible personal property going into and becoming a part of public works and projects owned by' * * * the United States." p. 138

The Court thoroughly discussed the lease provisions relative to the improvements and held that the government had a bare "paper title" to the improvements, thus the tax was valid.

7. See also *Tampa Bay Garden Apartments, Inc. v. Gay*, 55 So.(2d) 739 (Fla. 1951) confirming the *Jemison* case and requiring the operator of a housing project located on an Air Base apparently in all respects such as we have here to collect the state sales taxes on these rentals.

8. *Dayton Devel. Ft. Hamilton Corp., et al. v. Boyland*, 133 N.Y.S.(2d) 821 (1954). Title to the land was in the United States and title to the improvements was in the lessee. The court reviewed the statutes involved, upheld the property tax on the lands and buildings and stated:

"Succinctly put, the taxation by state or municipality may overpass the usual limits if the consent of the United States has removed the usual limits or lowered them." p. 832

and

"The statutes which authorized leasing the lands and insuring the mortgages on the buildings contain provisions which demonstrate that Congress intended that such lands and buildings be subject to local taxation." p. 833.

9. *Marhoefer, Jr. Co. v. Dept. of Revenue, Mich., Board of Tax App.*, Mich., CCH State Tax Cases, Par. 200-087, affirmed, Michigan Court of Claims, Dkt. Nos.

461, 465 and 466, Jan. 23, 1954. Appeals taken to the Supreme Court of Michigan were withdrawn by stipulation.

10. *Conley Housing Corp. v. Coleman*, Georgia Supreme Court No. 19001, September 12, 1955. The corporation sought to enjoin personal property taxation of its rental housing project on a government owned military reservation. The lease provided title to the improvements was retained by the lessee. *Held*: Congress had directed these projects be subject to local taxation.

11. *Moses Lake Homes v. State Tax Commission*, 148 Wash. Dec. 462 (Adv. No. 16, Mar. 15, 1956) upheld retail sales taxes, the legal incidence of which is upon the consumer (R.C.W. 82.08.050) imposed upon sales of materials used in constructing a similar project.

In cases where title was in the United States, taxation was upheld because the lessee was owner and thus taxable and Congress had consented. Where title was retained by the lessee, this was given as an additional reason supporting taxation.

12. Lastly, of course, this case—*Offutt Housing Company v. County of Sarpy*, (R. 195-214) 70 N.W.(2d) 382 (Neb. 1955).

See also *Aztec Land and Cattle Co. v. Navajo Realty Co.*, Arizona, Dkt. No. 210, *certiorari* denied, October 17, 1955. The fact that the United States held legal title to lands did not exempt them from taxation where title was in trust and beneficial ownership was in private hands.

CONCLUSION

There are a great number of these housing projects. From the reported cases, they are all being taxed. The United States Attorney General could not deem that federal property was being taxed or a federal policy controverted or he would be present.

Under general and Nebraska law (R. 206-7, 209-10), these housing projects would be taxed to the lessee were the lessor a private party or an exempt state entity. When the lessor is an exempt federal entity the same result should prevail unless Congress specifically directs otherwise.

Even assuming, contrary to the specific language of the government prepared mortgage, that the Air Force had title, appellant is the owner of all beneficial interests. The bare title and the reversionary interest on condition subsequent of the United States as lessor is not such an interest to prevent taxation of the improvements at their full value to the lessee.

Appellant has failed to allege or prove the "value" of the reversionary interest of the United States and that such interest was included in the measure of the valuation.

Congress could, we assume, exempt these housing projects from local taxation. It did not. Rather, in accordance with its uniform policy in dealing with local governments, it provided they should be taxed.

State and federal appellate courts have analyzed the common or general law governing these leases and the applicable federal statutes. All have concluded that the

improvements were taxable to the lessee and that Congress had consented even though federal jurisdiction was exclusive. Their reasoning is more than persuasive particularly upon non federal issues.

The decision of the lower court should be affirmed.

Respectfully submitted,

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